Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, MAYOR OF THE CITY OF ST. LOUIS, MISSOURI, and R. DEAN WOCHNER, M.D., DIRECTOR OF HEALTH AND HOSPITALS AND ACTING COMMISSIONER OF HOSPITALS OF THE CITY OF ST. LOUIS, MISSOURI,
Petitioners

v.

JANE DOE, AND A CLASS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

JACK L. KOEHR
City Counselor of the City of St. Louis, State of Missouri
EUGENE P. FREEMAN
Deputy City Counselor of the City of St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
(314) 453-3366
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

A. There are four separate "Memoranda and Orders" of the United States District Court, Eastern District, Eastern Division of Missouri, which are not reported. These are:

1. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on March 22, 1974;[1]
2. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on January 13, 1975;[1]

[1] Included in printed Petn. for Cert. Appendix.

3. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on August 8, 1975;[2] and
4. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on January 27, 1976.[3]

B. There is an opinion of the Court of Appeals for the Eighth Circuit entered on June 4, 1974, in Case No. 74-1232, reversing and remanding to the District Court in A-1 above, reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063.[2]

C. There is an opinion of the Court of Appeals for the Eighth Circuit filed April 14, 1975, in Case No. 75-1069, reversing and remanding to the District Court in A-2 above; thereafter before the mandate, there are also two substantial modifications of this opinion by orders entered on May 7, 1975, and June 2, 1975, with Senior Circuit Judge Van Oosterhout concurring in part and dissenting in part.[2] The case is reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 515 F.2d 541, as the opinion finally evolved after the aforesaid modifications.

D. There is an opinion of the Court of Appeals for the Eighth Circuit filed January 5, 1976, in Case No. 75-1648, reversing and remanding to the District Court in A-3 above. The case, styled *Jane Doe, et al. v. John H. Poelker, etc., et al.*, is officially reported as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 527 F.2d 605 (C.A. 8th C. 1976).

JURISDICTION

A final judgment dated and entered by the Court of Appeals on April 14, 1975, is sought to be reviewed.

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[2] Included in printed Petn. for Cert. Appendix.

[3] Set out in full in single Appendix.

The Court of Appeals entered an interlocutory judgment reversing a judgment of the District Court and remanding the case for trial on June 4, 1974. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order made on June 27, 1974.

A final judgment of the Court of Appeals, reversing the District Court and remanding for limited purposes was dated and filed on April 14, 1975. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order of May 7, 1975; and such order, in response to said petitions, substantially modified the opinion and judgment of April 14, 1975. Upon petitioners' timely motion for further amendment of the opinion and judgment as modified, the Court of Appeals again substantially modified its opinion and judgment on June 2, 1975, and granted petitioners the right to file second petitions for rehearing and rehearing *en banc*. Timely second petitions for rehearing and rehearing *en banc* were filed and denied by the Court of Appeals' order entered on June 24, 1975. The litigation continued in the District Court pursuant to the appellate mandates, and a final limited issue appeal (C.A., 8th C., No. 75-1648; Jan. 5, 1976; 527 F.2d 605) followed adverse to petitioners.

A petition for the issuance of a writ of certiorari was filed by the petitioners and docketed on September 20, 1975, as No. 75-442 in this Honorable Court, within 90 days as required by law. Such petition was granted by the Court on July 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

POSITIVE LAW PROVISIONS INVOLVED

The Constitution of the United States

Article III:

Section 1. The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendments to the United States Constitution:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, providing in applicable part:

* * * nor be deprived of life, liberty, or property, without due process of law;

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of Missouri, 1945

Article I, Bill of Rights:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

* * * * * * *

Section 2. Promotion of general welfare—natural rights of persons—equality under the law—purpose of government. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

* * * * * * *

Section 5. Religious freedom—liberty of conscience and belief—limitations. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Missouri Statutory Provisions

Section 197.032, Revised Statutes of Missouri, Laws 1973.

197.032. Hospitals and medical personnel may refuse abortions—no denial of public benefits for such refusal—civil action, when

1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of any such refusal to treat or admit for treatment any woman for abortion purposes.

2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

Charter of the City of St. Louis[4]

Article XVIII, Civil Service:

Sec. 3 (n) Removals and demotions.—For removals, demotions and decreases in pay in the cases of employes whose

[4] Article XVIII, is reproduced in full in the printed Petn. for Cert. Appendix.

service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16. Racial, political and religious discrimination.— No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

Sec. 22. Violations of civil service provisions.—Any person who shall willfully or through culpable negligence violate or conspire to violate any provisions of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall

be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance or misfeasance of public officers.

Federal Rules of Civil Procedure

Rule 52, findings by the court:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing the interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a woman's Federal constitutional privacy rights regarding abortion requires a municipally staffed and operated hospital to furnish medical personnel and facilities to comply with her request for an abortion based on her financial distress within her first trimester of pregnancy where no medical indications exist?

II. Whether the Fifth Amendment Due Process Clause of the United States Constitution and Rule 52(a) of the Federal Rules of Civil Procedure prohibit a Court of Appeals from finally reversing a District Court's well-found findings and substituting its own contrary Complaint constructions and untried factual conclusions, and then, for the first time, on such appeal relying thereon, levying punitive substantial "attorney fees" for "bad faith," without there having occurred any trial of any of such issues or conclusions in the District Court?

III. Whether Article III of the Federal Constitution requiring a case or controversy bars a Court of Appeals' judgment in favor of a woman pregnant at the time of filing suit for personal relief, and as sole representative of a class, claiming a constitutional right to an hysterectomy and an abortion by a municipality, where she secretly procures an abortion within five (5) days of filing and prior to summons of one defendant and before the case is heard by the District Court?

STATEMENT OF THE CASE[3]

Jurisdiction Below

The United States District Court's jurisdiction was predicated upon claims based upon the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution as-

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[3] Record support—

Due to the condition of disassociation of the multitudinous documents comprising the record, without congruity or sequential pagination, record support is indicated by descriptive identification and document internal citation. Where a matter or document is included in the single *Appendix*, a prefix abbreviation "App." is employed. To distinguish between District Court and Court of Appeals docket entries (abbr. "doc. ents.") of the record, the abbreviations "D.C." and "C.A." are respectively used.

serted under United States Code, Title 28, Chapter 85, Section 1343, Title 28, Chapter 151, Sections 2201 and 2202, and Title 42, Chapter 21, Section 1983.

The United States Court of Appeals' jurisdiction was grounded upon its statutory powers according to United States Code, Title 28, Chapter 81, Section 1291, the Federal Rules of Appellate Procedure, Rule 4(a), and the Federal Rules of Civil Procedure as applicable to the adjudication of appeals.

Facts Material to Questions Presented

This case was filed on August 17, 1973, in the District Court, Eastern District, Eastern Division of Missouri, by respondent as a sole plaintiff claiming to represent a too numerous class to join of pregnant women residents of St. Louis, Missouri (App. p. 1, D.C. doc. ent. 8-17-73; App. p. 6, Complaint, p. 3, par. 12). The only named defendants were John H. Poelker, Mayor of the City of St. Louis, and R. Dean Wochner, M.D., the City's Director of Health and Hospitals (App. p. 6, D.C. doc. ent. 8-17-73; App. p. 6, Complaint, p. 3, par. 13, and p. 4, par. 14).

The Complaint upon filing, after recitation of the jurisdictional grounds for the suit (see above), and an explanation of the failure to identify the respondent so as to avoid "embarrassment and harassment," claimed respondent was a married woman with a family, in her first trimester of pregnancy, who could not afford the expense of another child and consequent loss of employment because of the family's "severe financial straits;" that she suffered certain reproductive organ difficulties which necessitated an hysterectomy which properly should be simultaneously done with the abortion she desired. It was further alleged that she had gone twice in August of 1973 to one of the two hospitals of the City of St. Louis and was there advised by the hospital staff physician to get an abortion elsewhere and then return for the hysterectomy which "they" recommended be done. She

further alleged that such physicians expressed to her their refusal to abort her because of a "stated hospital policy of a blanket prohibition of abortions." The claimed basis for such refusal was that the petitioner Mayor, being the chief executive officer exercising control over the petitioner Director of Health and Hospitals and the City hospitals, on many occasions stated that abortion would not be allowed, and because of his high position, his statements were largely responsible for the existing situation of prohibiting abortions. The stated claim for bringing the action was her (and the class she claimed to represent) desire to utilize the personnel, facilities and hospital "for the termination of said pregnancy," and that such policies, rules, regulations, procedures, and practices interfere with and deprive her and "her respective physician of the right of privacy within the patient-physician relationship," and also deprive her of right as a woman "to determine for herself whether to bear children and maintain her marital privacy" as guaranteed by the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

The relief prayed for in the Complaint was a declaratory judgment that any City policies, etc. barring, thwarting, limiting, and infringing upon the utilization of the personnel, facilities, and services of the City's hospitals for abortions, are violative of her and the class's constitutional rights; and for a "permanent injunction" to restrain petitioners and their agents from enforcing such policy, etc., against respondent or the class, so as to avoid "irreparable harm and injury to plaintiff and said class." This latter prayer for injunctive relief was stricken by respondent on October 11, 1974 (App. p. 6, Complaint; D.C. doc. ent. Oct. 11, 1974).

From the time of the filing of the case and continuing substantially to the time just before the trial a year later (e.g., Aug. 28, 1974), the respondent designedly withheld from the petitioners (i.e., defendants) her identity and all other factual

matters from which any knowledge of the truth or falsity of the Complaint's averments could be determined (App. p. 6, Complaint, p. 2, par. 4; D.C. doc. ent. 10-2-73; App. p. 54, C.A. Case No. 74-1232, doc. ent. No. 7, April 8, 1974, *Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law;* Record, letter to Hon. Roy W. Harper, D.C. judge, July 31, 1974, from Eugene P. Freeman, Atty. for Defts.) Concomitantly, respondent sought to conclude the case favorably to herself before petitioners could conduct discovery (D.C. doc. ents. 9-12-73, 9-19-73, 10-2-73, 10-5-73; C.A. Case No. 74-1232, doc. ent. No. 3, April 1, 1974; D.C. doc. ents. 7-15-74, 9-17-74, 9-25-74). Because of the respondent's principal attorney's express refusal to cooperate in discovery without protective orders, while urging the petitioners and the courts the utmost of expedition of all other matters, petitioners, on September 21, 1973, moved the District Court for an order, with reasonable limitations which might appear proper, requiring submission to discovery according to the Federal Rules of Civil Procedure (D.C. doc. ents. 9-21-73, 2-25-74). No action was taken by the District Court upon either motion, and later at the first intervening appeal to the Court of Appeals (Case No. 74-1232), petitioners, to protect against respondent's urgings to the appellate court to decide her appeal on the broad constitutional questions incorporated in the Complaint, moved the Court of Appeals for protective orders against decision without opportunity for discovery and trial (C.A., Case No. 74-1232, Appellant's Statement, Brief and Argument, p. 29, et seq.; Op. cit. App. p. 54, and p. 3, C.A., Case No. 12-1232, doc. ent. No. 7, April 8, 1974). (The appellate court did not expressly rule on the petitioners' motion, but it did not decide the broad matters urged upon it by respondent, Petn. for Cert., App. p. A-11).

In addition to pressing for decision before petitioners could learn any of the facts relating to the case and at a time peti-

tioners were forced to make answer and respond to interrogatories without any knowledge about the case, the respondent misled the District Court and the petitioners by filing a motion for summary judgment supported by a false and deceptive affidavit on October 5, 1973 (App. p. 1, D.C. doc. ent. 10-5-73; App. p. 37). The falsity and deceptiveness lay in the fact that the affidavit tracted the Complaint's conclusionary allegations of fact, and added (see Affidavit of Jane Doe, par. 8) that she had been advised by a private physician:

> "* * * that the ordinary and routine medical procedure *in her situation* is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *."

(emphasis added); and at paragraph 9 of the affidavit it was sworn:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The jurat of the affidavit was made on October 4, 1973, forty-three days after the respondent had been aborted (which was unknown to either the District Court or petitioners at the time), and the Notary Public administering the oath is one of the attorneys of the respondent then of record and active in the case. (See attorney names and signatures to Complaint and Affidavit of Jane Doe.)

The first factual knowledge of any kind that the petitioners learned about the respondent or her lawsuit filed on August 17, 1973, occurred through a television and radio public media account of an interview of respondent's attorney (or attorneys) wherein the statement was made that, at the time, February 22, 1974, the respondent had undergone a prior abortion at an

undisclosed date. However, no other factual information about the identity of respondent or the details of her District Court pending action was learned by the petitioners at this time.

As a result, petitioners filed a motion to dismiss, on the hypothetical truth of the news media reports, urging the reported abortion and possible hysterectomy destroying future possibility of pregnancy, as destructive of standing; reminding the Court that without a favorable ruling on their pending motion to require disclosure of the respondent's identity and submission to discovery process petitioners could not defend themselves (see D.C. doc. ent. 9-21-76); and also asking the Court to require the respondent to disclose the truth as to her bodily condition of pregnancy and hysterectomy (D.C. doc. ent. 2-26-76), for purposes of the petitioners' (i.e., defendants') motion.

In consequence of the foregoing, the District Court did require respondent's attorneys to inform the Court as to the extra judicially reported abortion. Respondent's attorney responded advising the Court that she had undergone an abortion on August 22, 1973.[6] No information regarding an hysterectomy was disclosed. At the time the respondent secured her abortion (i.e., 8-22-73) one of the petitioners had not been summoned (App. pp. 1 and 13; D.C. doc. ent. 9-4-73), and she had taken no action to secure *pendente lite* orders or other relief.

On March 22, 1974, the District Court sustained the petitioners' motion to dismiss (i.e., D.C. doc. ent. 2-26-74) and rendered a memorandum opinion (see Petn. for Cert., App. p. A-1). Respondent appealed to the Court of Appeals for the Eighth Circuit and by that Court's judgment the District Court was reversed and the case remanded for further proceedings in

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[6] See partial letter to Hon. Roy W. Harper, District Judge, from Mr. Frank Susman, plaintiff's (e.g., respondent) attorney, dated Feb. 25, 1974, later adopted as *Exhibit 1 to Court's Opinion* of March 22, 1974, (Petn. for Cert., App. p. A-1, l.c. p. A-10; D.C. doc. ent. March 22, 1974).

accordance with the opinion (C.A. doc. ents. No. 15, June 6, 1974; see Petn. for Cert., App. p. A-11). The gravamen of the Court of Appeals' holding was that standing upon filing was all that was constitutionally necessary to satisfy jurisdictional requirements.

After remand to the District Court, upon pre-trial conference called on August 9, 1974, to dispose the case for trial and fix a trial date, petitioners again urged the need for orders for discovery from the respondent, and it was then agreed by the Court and the parties that the respondent should expeditiously submit to oral deposition. It was further directed by the Court and agreed to by the parties that all of the respondent's (i.e., Jane Doe) testimony was to be held in strict confidence by the parties and the reporter, and petitioners' attorney was to file the original transcript with the Judge (rather than the Clerk of the Court) in order to maintain confidentiality.

On August 28, 1974, respondent Jane Doe's oral deposition was taken by petitioners.[7] Other than the aforesaid knowledge of the respondent's abortion, this was the first opportunity of petitioners to learn anything specific concerning the allegations of the respondent in the Complaint, the questions of the interrogatories, and the Plaintiff's Motion for Summary Judgment filed October 5, 1973.

After taking the respondent's deposition, the petitioners, then knowing the identity and specific factual assertions of the respondent, conducted their own investigation. Resulting therefrom, petitioners on November 1, 1974, filed their Motion for Summary Judgment supported by affidavits of each physician and hospital staff member who had come into professional

[7] Because of the special arrangements surrounding the taking and use of such deposition, no docket entries were made and the filed original of the transcript was within the personal custody of the Judge's chamber and outside the knowledge of the Clerk of the Court.

contact with the respondent, and the hospital records relating to her (D.C. doc. ent. Nov. 1, 1974). These squarely contradicted the respondent's evidence in support of summary judgment. On November 20, 1974, the District Court overruled both the respondent's and the petitioners' motions for summary judgment (D.C., doc. ent. Nov. 20, 1974).

Sometime shortly before the trial date of November 25, 1974 (D.C. doc. ent. 10-25-74) and after filing of petitioners' above referred to summary judgment motion of November 1, 1974, a pre-trial conference was held by the District Court Judge.[8] At such conference respondent's attorney for the first time (and shortly prior learning of petitioners' defense from the proof in support of the motion for summary judgment), inquired of the Court whether he might introduce evidence of the physician procurement procedures of the City. After a discussion of the matter by all present, the Court advised respondent's attorney that under the then status of the Complaint, such evidence was inadmissible, but respondent could either amend the Complaint to include such issue or file another lawsuit to litigate such matter.[9] In the history of the case the Complaint was never so amended, and the trial court at the trial following, consistently ruled that evidence of the respondent offered on such matters was beyond the scope of the issues formed by the Complaint and was inadmissible. The petitioners relied on these rulings and confined their defense and proof to the issues determined to be triable by the District Court's rulings (T. 57-58).

[8] Apparently a docket entry was not made, and petitioners are uncertain of the exact date. We now believe that a second conference, after that of August 9, 1974, was held. (See: Petn. for Cert. p. 15, first full par.)

[9] Support for the foregoing is found in the typewritten transcript of the trial of November 25, 1974 (*Transcript of Proceedings*, U. S. Dist. Ct. No. 73-C-565 (A); hereinafter designated by the abbreviation "T" with page indication); T. 57-58; see also *Respondents' Brief in Opposition to Petition for Writ of Certiorari* (etc.), pp. 9 and 10, quoting T. 60-61.

Upon trial without a jury on November 25, 1974, the case was presented in less than a full day, with a long noon recess (to accommodate respondent) and an early afternoon adjournment.

Respondent, through the Mayor and Doctor Wochner (Director of Health and Hospitals and Acting Hospital Commissioner) established that the policy or rule, existing for years pursuant to Missouri State law against abortion other than to save a mother's life, was directed to be continued to Doctor Wochner by the Mayor sometime in May, 1973, after his election in April of that year. As understood by the Mayor and Doctor Wochner, the question of jeopardy to the mother's life was a medical decision to be determined by the patient's attending physician (T. 6, 7, and 20). Intensive discussions were occurring between them up to the time this suit was filed regarding the legal, medical and moral questions of the policy, and that litigation was going on in the State with attendant great public uncertainty (T. 8). The Mayor has deep moral feelings against non-therapeutic abortions which was communicated to Doctor Wochner, but he (Wochner) believes abortion service ought to be given at the City's hospitals (T. 6, 7, 10, 20-26). Because of the continuing discussions and the Mayor's feelings, Doctor Wochner did not implement the installation of such service (T. 30-31). Doctor Wochner had weekly or biweekly conferences with his hospital medical cabinet at which the status of these discussions was reported, but the only person he informed in writing regarding such policy was the president of his medical staff. No general directive was made (T. 26-27). The working physicians and medical students, of City Hospital No. 1, gynecology and obstetrics Division No. 2, service, who came in personal contact with respondent, were not informed of such policy, nor was the chief of their said Division. And each testified that it was not a factor in their treatment of her (T. 49, 50, 85, 91-95, 101, 104, 108, 113-119). Further, neither of the hospitals bylaws dealt with abortion (T. 39).

The respondent's evidence demonstrated that the City's hospitals have an organic medical staff. Private physicians are not allowed to admit or treat patients in them. Each hospital patient is a patient of the City treated by City hospital physicians (T. 32 and 33). The City's hospitals are also medical instructional institutions having teaching relations with the two medical schools in St. Louis, namely, St. Louis University, a Jesuit, Catholic institution, and Washington University (formerly sectarian but is now nondenominational) (T. 33). Medical school teaching professors are furnished as staff instructors in many of the services of the City's hospitals and in some services medical students receive some of their clinical instruction (T. 31-33). The Ob-Gyn service at City Hospital No. 1 is staffed by physicians and attended by medical students affiliated with St. Louis University Medical School (T. 33). Respondent attempted to prove the physicians at City Hospital No. 1, practicing in Gyn-Ob Division No. 2, were prohibited through their affiliation with St. Louis University Medical School from performing non-therapeutic abortions at the Hospital before medical students. However, the Court overruled such attempts and admitted the personal professional, ethical, moral and religious views of such physicians as material to their theoretical interpretation and execution of the contested claimed policy of the Mayor (T. 57-58). Respondent's attorney admitted that physicians at the City's hospitals are entitled to their own ethical opinions and to act upon such opinions (T. 35).

The proof relating to respondent's factual relations was provided by her medical record kept by the Hospital (Resp. Ex. No. 2, T. 18 and 82); the testimony of the Hospital medical personnel who treated her there, and her account of the same occurrences.

The medical record and the medical personnel agreed that she had a long history of treatment at the Hospital starting in 1963 when she was 17 years old (Resp. Ex. No. 2, pp. 2-4). Immedi-

ately relevant to this suit she made a visit on August 7, 1973, at age 26, to the Gyn Clinic complaining of vaginal infection about which she had visited the Clinic about a month before. She also stated she thought she was pregnant and, if so, wanted to know the fetal age for a possible abortion with "Planned Parenthood" (T. 86; Resp. Ex. No. 2, pp. 7-8). Examination by a third-year medical student (under general supervision) indicated suspected pregnancy, vaginal infection, some small polyps in her cervical canal, and retroverted uterus. Her general condition of health was good. Routine laboratory tests were ordered including a pregnancy test; and she was given a future appointment to Gyn for August 13, 1973, to learn the outcome of the tests. She was also given medicine for the infection. No medical indications for abortion were observed (T. 85). She did not indicate she wanted an abortion at the City Hospital (T. 88).

On August 13, 1973, respondent returned to the Gyn Clinic where she again was treated by another third-year St. Louis University medical student. She was immediately told the test specimen of August 7, indicated she was pregnant. Whereupon she became very distraught saying because of the possibility of her husband going to prison she wanted an hysterectomy and an abortion (T. 96). The student then consulted with a physician superior who directed that she be given an appointment at the Obstetrics Clinic (T. 94). Because of her upset condition he gave her an appointment to the Ob Clinic for the next day, August 14, 1973. He found no medical indications for abortion or hysterectomy (T. 91, 94-95; Resp. Ex. No. 2, pp. [after No. 7] and 8), and that, at the time, he was unaware of any City hospital policy against abortion (T. 97). He advised respondent that, under her health circumstances, he knew of no physician at the hospital who would perform an abortion for the reasons she related (T. 96-97).

On August 14, 1973, she returned to the OB Clinic of the Hospital (Resp. Ex. No. 2, pp. 9, 10, 11 [12]) and was there

received by a staff physician who initiated a usual past history investigation when the respondent interrupted to ask if such was necessary since she was there only for the purpose of securing a statement of the length of gestation for possible cessation at another facility (T. 101). He told her that because of his personal ethical, professional, moral and religious beliefs, where she had no medical indications for abortion (T. 102 and 104), he would not give her such a statement to be used for abortion, but would refer her to another physician (whose beliefs he did not know) who might give her the statement she desired (T. 102). He, too, was unaware at that time of any City hospital policy against abortions (T. 107-108).

Immediately, respondent was referred to Dr. Ziad Abu Dalu, a graduate of the medical school of the University of Cairo, Egypt (of the Moslem Faith), who on the occasion was affiliated with St. Louis University since 1972, and a resident physician at the City Hospital (T. 110). During Doctor Dalu's initial interview of her she told him of her personal reasons for wanting to abort her child, amongst which he remembered was the possibility of her husband going to jail. She told him she had been to "Planned Parenthood" and had been asked to pay $175 for an abortion which she couldn't afford and, therefore, wanted the abortion from City Hospital (T. 112-113). He told her "we couldn't do one at City Hospital and I didn't explain to her my personal reason or otherwise." (T. 113). He testified that the reason he told her this was because in his medical judgment an abortion was not medically justified under her circumstances (T. 113, 118-119). He was aware of the University policy regarding abortions but not of a policy of the City (T. 118-119, 123). He gave her the certificate of fetal age she had requested (T. 116-117); such certificate was later tendered to the abortion clinic for the August 22, 1973, abortion, and procured from its records (T. 79 and 82; Exhibit B). Respondent appeared again at the Hospital OB Clinic the next day (August 15, 1973) and

was immediately referred to Doctor Dalu on her claim of bleeding from the vagina. He found her claim to be false (T. 114).

Respondent's testimonial version of the same occurrences was markedly different in several material respects. She claimed, contrary to the medical personnel, that she initially went to the Hospital to secure an abortion there (T. 64-65). Whereas, the medical records made at the time and introduced by respondent clearly recite that her initial purpose was to determine pregnancy and fetal age for use at another facility (T. 36, 64-66; Resp. Ex. No. 2, p. 7; Resp. Ex. No. 4 at 79, 82). The testimony of the Hospital medical staff also refutes her (see individual testimonial references, supra). She also attributed the physicians refusal to abort her as being based by them on a City policy against abortions (T. 67, 70, and 72). She attributed to Doctor Dalu advice that he would perform an hysterectomy on her at the Hospital after she was aborted elsewhere (T. 73). Whereas, none of the City physicians found any medical reasons for removal of her reproductive organs (Resp. Ex. No. 2; Defts. Ex. A and B, p. 118).

The District Court found that each medical student and physician who examined respondent at the City Hospital found no medical reason for aborting her and that such medical decision was based upon the opinion of the medical person uninfluenced by any policy of the City regarding abortions; and that none of them knew of any such City policy. The Court declared Section 197.032, Revised Statutes of Missouri, to confer the right upon these physicians (inter alia) to be free from any lawful coercion to perform abortions in the City's hospitals against his personal beliefs, and that the respondent did not challenge the physicians' actions under such statute. The District Court recognized a qualified Federal constitutional right of respondent to an abortion, but declared she had no right to demand that the City's physicians accede to her wish or the City so accede, where no medical reasons existed. The Court found

no design or purpose of the City to deny respondent any of her Federal constitutional rights.

The respondent appealed such decision to the Court of Appeals (C.A. 8th Cir.). The points raised before the Court were: 1, whether the District Court erred in ruling that the Complaint did not put in issue the City's procurement of physicians from a religious denominational medical school; 2. if the District Court erred in so construing the Complaint, whether the proof established a violation of respondent's Federal constitutional privacy rights regarding abortion because of the procurement of a medical staff possessed of professional beliefs against non-medically indicated abortion; and 3, whether, if respondent prevails, attorney fees on the basis of her acting as a "private attorney general" ought to be awarded (C.A. Case No. 75-1069; *Appellants' Statement, Brief and Argument*, pp. 9, 12, 21, and 26).

Petitioners vigorously defended against these contentions pointing out that respondent utterly failed to even point out or isolate any "clearly erroneous" findings of the District Court, and was asking for a trial *de novo* at the appellate level. The failure of respondent's proof within the issues framed by orders and rulings of the District Court was also urged; and the lack of an unlimited right in the respondent to demand an abortion contrary to the decision of the physicians was argued (C.A. Case No. 75-1069; *Appellees' Statement, Brief and Argument*, pp. 1, 24, 28, and 38).

The Court of Appeals, determined that the District Court erred in construing the Complaint to exclude the issue of medical staff procurement, and held that the proof established that the City's Mayor, through the combination of his policy against non-therapeutic abortions and the physician procurement practice, denied the respondent her constitutional rights regarding abortion. The Court also found that reasonable attorney fees

for the appellate stages of the litigation were $3,500, and awarded such sum to the respondent for acting as a private attorney general in securing the Federal constitutional rights denied by the Mayor; further, the Court ordered the District Court to determine and award reasonable attorney fees on the same basis to respondent, against the petitioners, for the trial phase of the case. Injunctive relief was awarded against the petitioners, requiring them to secure physicians who have no objections to performing non-therapeutic abortions. (See: Petn. for Cert., App. pp. A-27, A-40, A-44.)

Petitions for rehearing and for rehearing *en banc* were filed by petitioners which, while being denied, resulted in first modification of the Court's judgment striking the injunctive relief and substituting the same declarations of immediate constitutional duty as declaratory relief (see: Petn. for Cert., Appendix, p. A-40).

Thereafter, in due time, petitioners moved the Court to strike its award of attorney fees as unauthorized because the Federal statutes sued on, did not authorize such awards. At this time the respondent moved the Court to allow such fees on the basis of the "bad-faith" of petitioner Mayor Poelker. Such fees were so allowed by a second modification of the judgment. At the time of such order of modification, a right to file a second petition for rehearing and rehearing *en banc* was granted petitioners. Such second petitions were made and denied (Petn. for Cert., Appendix, p. A-44).

Upon remand to the District Court a hearing was held to determine the amount of reasonable attorney fees to be awarded according to the mandate. The District Court, applying the guidelines of a case cited as to be followed by the Court of Appeals, found the sum of $9,317.50 as a reasonable fee for the trial stage services, but on stipulated evidence showing no obligation to pay any attorney fees by respondent, and to

donate any fees adjudged to the American Civil Liberties Union (Stipulated Ex. No. 1, C.A. Case No. 75-1648), did not adjudge such sum against the Mayor (Petn. for Cert., App. pp. 55-56). The respondent appealed this judgment to the Court of Appeals (D.C. doc. ent. 8-14-75; C.A., Case No. 75-1648, doc. ent. 8-20-75). On January 5, 1976, the Court of Appeals reversed and remanded the case to the District Court for proceedings consistent with the appellate court opinion (*Jane Doe, et al. v. John H. Poelker, etc., et al.*, Case No. 75-1648; 527 F.2d 605, C.A. 8th, 1976). The District Court entered appropriate orders to comply with the Court of Appeals mandate.[10]

Pursuant to orders of the Court of Appeals, granted on motions of petitioners, the attorney fees sums of $3,500 and $9,317.50 awarded respondent have been paid into the registry of the District Court pending disposition of certiorari in the Supreme Court of the United States (C.A. doc. ents. Nos. 31, 32, and 12; C.A. doc. ents. Nos. 12 and 13).

SUMMARY OF ARGUMENT

I. Abortion on Demand

The Court of Appeals' holding that indigent pregnant women wishing to be aborted are denied equal protection of law under the Fourteenth Amendment of the Constitution when the City provides *childbearing* hospital care but has not established and provided abortion services after abortion became lawful, is in error since:

1. A woman does not have an absolute right to be aborted upon her own election, but has a limited constitutional right

[10] Record of District Court docket entries does not reflect proceedings after August 14, 1975.

to *her* physician's independent medical judgment and care as abortion may relate to her health and life.

2. The City, in providing childbearing medical services through its hospital in partaking in the exercise of the State's fundamental constitutional right, flowing from its highly important interest in promoting both maternal and child health and well-being which conceptually, is totally distinct and mutually exclusive from abortion, and as a logical consequence women electing to be aborted and thereby removing themselves from the area of inclusion where this interest of the State exists, are not then deprived of equivalency of treatment when the City does not act to meet their highly dissimilar choice involving substantially different medical services.

3. The assumptions of the Court of Appeals that routine or minor surgical procedures performed in the City's hospitals are medically indistinguishable from abortion procedures betrays a grossly insufficient comprehension of the factual realities of providing abortion services, and is in opposition to the Supreme Court's determination of the uniqueness and complexity of the abortion decision both for the woman and physicians in the practice of medicine and as it effects the hospital. Abortion confronts a publicly staffed hospital with multiple novel problems not encountered in other services. Staff procurement involves ideological (etc.) investigation and discrimination based upon unlawful bases. Administration must accommodate the full gestational period and be responsive to the particular physical and psychological circumstances of the patient. The facilities available are forced to be appropriated to the use of abortion cases without reference to the acute needs of other services. Personnel problems arising out of deep personal persuasions affect ordinary assignments, cooperation, and result in serious moral factors. All grossly at variance with other hospital routine services.

4. The Court of Appeals' mandate upon the City to provide physicians to perform abortions necessarily presents an insolv-

able constitutional dilemma for the City. As a consequence of the unique function the physician provides in the constitutional scheme of lawful abortion, the municipal hospital is constitutionally prohibited from participation in the abortion decision. At the same time the City must assemble a medical staff, which in its full spectrum, will embrace all ideological (etc.) incidents legally considerable as medical indications for the "abortion decision." In so doing it places at the service of the woman electing for abortion an effective power to negate the constitutional requisite of independent medical judgment, resulting in abortion on demand.

5. Under the circumstances of this case the Court of Appeals erred in its assessment of the constitutional implications of the facts since the policy complained of was shown by the proof not to have been involved in respondent's failure to secure from the City the abortion she wished; but that the personal views and persuasions, of the several physicians she encountered, proper and lawful in themselves, resulted in their independent medical decisions that she had no indications for abortion. And her complaint in essence, is a disagreement with the individual judgments and beliefs of such physicians and not with the ineffective City policy.

II. Appellate Abuse of Discretion

1. Overturning the District Court's Findings.

The Court of Appeals was, in fairness and equity, bound to recognize the great disability the petitioners were subjected to in attempting to defend against the deceptive litigational tactics and unfair strategy of the respondent, and that such circumstances had a crucial effect in shaping the issues to be tried and the conduct of the trial. However, after petitioners in good faith adapted to these circumstances and fairly litigated the claims taken by the trial court between the parties, and prevailed, the Court of Appeals materially abused its discretion and exceeded

its lawful powers, when on appeal it reconstrued the Complaint to include City hospital staff procurement which had been excluded together with evidence relating thereto by the District Court, and thereafter, without demonstration of error in the findings of the trial court, in legal effect retried the case *de novo* upon such reconstructed complaint, employing excluded evidence and adopted inferences to make its own finding on untried issues, and thereby reversing the District Court and depriving the petitioners of judgment without trial in violation of due process of law and the procedures of proper appellate review.

2. **Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."**

The Court of Appeals abused its appellate discretion through its interjection at the appellate level of the question of an award, and making awards, of substantial attorney fees against petitioner Poelker not raised by the Complaint nor authorized by the statute under which respondent sued, and then after recognizing the unlawfulness of such awards, changing its position to make identical awards upon a conviction of "bad-faith" with gross public castigation of petitioner, not tried before or found by the District Court, and without any notice, hearing, or opportunity to contest such conviction or castigation in the appellate court. Further, the essential bases for such conviction, namely: petitioner's official acts and judicial defense against respondent's claims, assumed by the Court of Appeals to be contrary to well-settled law; are factually erroneous and insufficient at law as a warrant for the imposition of punishment and public castigation.

III. **Justiciability, Standing and Mootness**

The Court of Appeals misapplied the rule of *Roe v. Wade* as to standing.

Since the respondent voluntarily procured her own abortion within five days after filing suit and at a time before both petitioners had been summoned, she thereby lost her *trial standing* to sue, made the issues she attempted to raise moot, and since she was the sole representative of the class, destroyed any class aspect the case theretofore might have had. When the Court of Appeals decided that respondent had standing and the case was justiciable and not moot, relying upon *Roe v. Wade*, it misapplied the appellate review standing rule to a *trial* standing situation, contrary to reason and the imperatives of Article III of the Constitution. The necessary character of Federal adjudication under such circumstances was the rendering of an "*advisory opinion*" without jurisdiction according to the Constitution.

ARGUMENT

Preface

On January 22, 1973, this Honorable Court's decisions of *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179, authoritatively defined the United States constitutional dimensions of a woman's rights to privacy in relation to the majority of the several states' criminal laws relating to abortion. While these decisions were fundamental and far reaching in their effect upon the legal-societal structure of our Nation, they were positively limited to the constitutional questions inherent in those cases before the Court. In a word, the Court did not attempt to address, much less resolve, the many other relationships and factual conditions that would necessarily and subsequently arise within the context of a woman's and other entities' constitutional rights relating to childbearing. This judicial situation not only obtained as a result of well-established rules of constitutional decision (q.v., *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, and *United States v. Raines*, 362 U.S. 17, l.c. 21), but by an express *caveat* of the Court (e.g., *Roe v. Wade*, 410 U.S. l.c. 165, n. 67). Historically and actually the Court later confirms this through *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 44 L.W. 5198;[11] and *Bellotti v. Baird*, — U.S. —, 44 L.W. 5221. Clearly then, constitutional interrelationships in areas outside of these *Roe* and *Doe* landmark cases remained to be considered and adjudicated as they arrive before this Court; and until such authoritative settlement occurs, these "• • • secondary • • • issues" have remained open and subject to very diverse opinion and contrariety of decision before lower courts.

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[11] Citation to The Bureau of National Affairs, Inc., *The United States Law Week*, volume and page, official reports being unavailable at the time of writing.

Petitioners respectfully submit that this case (while containing other additional issues addressed in subsequent divisions of argument), is one of those not ruled by *Roe* and *Doe* or the later decisions of the same general constitutional field. The District Court clearly recognized this *hiatus* in controlling precedent (Petn. for Cert., App. p. A-23, fourth par.); however, we believe the Court of Appeals overlooked this absence of decisive pronouncement by the Supreme Court; but unintentionally confusing what are in truth its own interpretations and extensions as or for substantive teachings of this Court. The regrettable product of this phenomenon is the absence of any threshold analysis of the novelty of the issue involved with a resultant rationale of decision pointedly directed to such new questions presented.

This, we believe, was not the only unfortunate result, but because of the Court of Appeals so adopted perspective, other matters of the whole of the case were much adversely affected. As a concomitant matter, the Honorable Court of Appeals' perception of the petitioners' (and their attorneys) acts and litigational measures were unfortunately cast in a grossly unfavorable light not in accordance with the real truth of the situation and in opposition to the understanding of the District Court. This is greatly regretted and counsel assumes some measure of blame for an apparent failure to make matters clearer to the Court of Appeals. However, in the following presentation of our arguments upon the questions under review it is sincerely hoped that this Court is better served.

Finally, just as we respectfully disagree with the Court of Appeals because it is our strongly held belief that the Court reached results unsupported by reason, principle, and equity, we also wish to make abundantly clear that our references to matters of record and vigorous argument thereon about trial tactics and strategy of opposing counsel, is not intended or to be construed as personally attacking these brothers at the bar, but

likewise is occasioned because these referred to incidents of the case are thought to be highly significant in communicating the merits of our claims to this Supreme Court for its dispassionate consideration.

I. Abortion on Demand

At the outset in addressing the question of the City's duty to render abortion services to the respondent as adjudged by the Court of Appeals, petitioners urge that it is crucial in the valid application of rationality to the facts of this case to appreciate that, in literal, factual accuracy, this case does not present a situation where a woman's claim of unconstitutional limitation upon her privacy rights in deciding upon abortion or in carrying such abortion is actually involved.

Rather, analysis of the significant facts compel the conclusion that what is truly or objectively present is the respondent's claim (somewhat obscured by diverting immaterial considerations) that she has, after personally electing for abortion, a further additional constitutional right to coerce the state (e.g., defendant municipality) to accede to her demand (politely phrased as a "wish") and participate to the extent of providing the required medical personnel, services, and facilities to carry out the abortion for her.

Nowhere in the factual incidents of this case has the City or its officials, in precise fact, actually interfered with to stop, deny, prohibit, or otherwise directly negate the respondent's decision to abort her pregnancy or to prevent her from carrying such decision out. This fact is particularly highlighted by the settled circumstance that respondent did procure on her own the abortion she determined upon.

Logically, it is only through a process of reasoning which must first postulate a constitutional duty on the part of the state

of placing the means for abortion at the respondent's disposal that the constructively arrived at colorable claim of "interference" with her privacy or a constitutional deprivation arises. It is this proposition that the Court must consider and adjudicate in the light of reality and its necessary consequences. Such an examination of the constitutional dimensions of this novel question must, of course, take into account the situation not only from the standpoint of the respondent's position, but also the pertinent factors supporting the constitutional claims of the state. In this it appears highly important to bear in mind and repeatedly emphasize that this case commends itself to the Court as one of undiluted constitutional character, having no aspect of statutory, derivative, constitutional implications.

Examination of the merits of the Court of Appeals opinion[12] supporting its judgment of petitioners' unconstitutional "discrimination" against respondent, demonstrates that it is expressly based upon a conclusion that the "[C]ity policy" prohibiting elective abortions coupled with the City's physician procurement history ". . . combine to deny Doe [respondent] and her class the equal protection of the law. . . ." afforded by the Fourteenth Amendment of the United States Constitution.[13]

In support of this decisional conclusion of Fourteenth Amendment, Equal Protection Clause violation, the Court of Appeals declares that the City, constructively is telling indigent women like Doe [respondent] that:

> . . . if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to

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[12] Doe, et al. v. Poelker, (etc.), et al., Petn. for Cert., App. p. A-27.

[13] Ibid., Petn. for Cert., App. p. A-35.

terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth.[14]

Reasoning from this *posited* assessment of the situation obtaining the Court then immediately explicates its *ratio decidendi*:

> . . . And it is certainly true that this distinctive treatment represents as much interference in the abortion decision of an indigent woman by the city as the prohibition of all non-therapeutic abortions in city-operated hospitals condemned by this Court in *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 95 S.Ct. 169 (1974) . . .[15]

Two immediate observations can be made regarding the Court of Appeals declarations. Initially, it ought to be clearly noted that the Court appeared to believe that the woman's wish or desire for abortion is the real determinate factor, as distinguished from the medical determination by the personal physician in consultation with his patient as repeatedly taught by *Roe v. Wade*, 410 U.S. 163, 164, and 165; and also that the woman's rights in the abortion decision are not absolute, ibid, at 153. These postulates were, of course, lately reaffirmed in *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 44 L.W. 5197, l.c. 5199 "III." This assumption of the woman's ascendancy is not merely semantical but is repeatedly demonstrated as being substantive by the Court of Appeals' discussion emphasis of the woman's "wish" or "desire" and its final command to the City to procure ". . . physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion . . ."[16] It can be well said

[14] Ibid., App. p. A-33.

[15] Ibid., App. p. A-33.

[16] Ibid., App. p. A-36.

from this that such reasoning, at the very least, infuses the opinion with a questionable basis in *Roe v. Wade* and *Doe v. Bolton*.[17] Secondly, the fact of "distinctive treatment" between maternity cases and elective abortion cases as being violative of constitutional equal protection, is a qualitative judgment which is not self-evident, or expressly premised upon any authoritative instruction of the Supreme Court. In following discussion we have urged what we believe to be substantial reasons to support an opposite principled result.

In fairness to the Court of Appeals, the pertinent rationale of the decisions it cites as supportive of its reasoning are required to be analyzed and critiqued for their intellectual persuasiveness on the question.

The starting point of the Court of Appeals legal reasoning is its reversion to its own decision of *Nyberg v. City of Virginia*, 495 F.2d 1342 (C.A. 8th Cir. 1974); app. dis. and cert. den., 419 U.S. 891 (S.Ct. 1974). In this case the Court held a municipal hospital resolution restricting the performance of abortions in the hospital to instances required to save the life of the mother, to be unconstitutional as unduly restrictive of a woman's constitutional rights of abortion on the authority of *Roe v. Wade*. A fact crucial to understanding the application of the decision is that the physician involved were private physicians (admitted to practice at the hospital) who were desirous of using its facilities for the performance of abortions on their private patients at the City's hospital and were prevented from doing so by the aforesaid resolution. (See: *Nyberg v. City of Virginia*, 361 F.Supp. 932 (D.C.D. Min., 1973), l.c. 939; *Doe v. Poelker*, D.C.E.D.E.D. Mo., Jan. 13, 1975, Petn. for Cert., App. p. A-19, l.c. A-24 to A-25).

In assaying *Nyberg*, it is patently evident that the Court of Appeals in articulating its decision did not proceed from a

[17] See note No. 8, infra.

fundamental constitutional examination of the question of a state's duty to provide a woman with the means for making the abortion decision and if decided upon, its accomplishment. Rather, the case was viewed as presenting the narrower issue of the physician's constitutional right to utilize the hospital's facilities for carrying out abortions he had already decided to perform. This latter question does not involve the state in the *decision* aspect but only the provision of medical service adjuncts to the woman's physician. (See Court's disclaimer of affecting the broader proposition at 495 F.2d 1347, [7].) Confined within this legal framework the Court then, first *positing* the *Roe v. Wade* established physician's function of making the abortion decision,[18] transposed the state's duty to refrain from interfering with the abortion decision to a legal constitutional equivalency with providing the physician with the facilities for effectuation of his decision to abort his patient. The legal warrant for this logical inversion of the constitutional principle adopted is largely taken from the case of *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (C.A. 1st Cir. 1973). Several repeated factors quoted from this case are isolated as sufficient to impose such a constitutional duty upon the municipal hospital (e.g., state). These being: in order to service the physician, no new or different facilities would be required, nor would the normal routine of the hospital be disrupted; and that abortion is "medically indistinguishable from other surgical procedures" routinely provided by the hospital. The *hiatus* of logical connection between the existence of a constitutional right to make the abortion decision and to carry it out on the one hand, and a duty of furnishing of the means by another to facilitate the operation on the other hand, is apparent. The convenience to the physician (and collaterally the woman) and the postu-

[18] The Court curiously denominates the "abortion decision" of the physician recognized in *Roe v. Wade* as ". . . a constitutionally protected *choice*. . . .", (emphasis added) in speaking of what the Supreme Court clearly defines as a medical judgment (495 F.2d 1347).

lated lack of detriment to the hospital are raised to the status of constitutionally decisive considerations. In final justification the Court repeats in balder terms its *ipse dixit*, in form substituting the obverse of its decision, labeled as a *"non sequitur,"* apparently believing this to be a persuasive elucidation of reason supporting its result (495 F.2d 1346).

Examination of *Hathaway v. Worcester City Hospital*, supra, readily confirms that the Court of Appeals in *Nyberg* faithfully adopted its rationale. Essentially the "medically indistinguishable surgical procedures" with equivalency of risk, and availability of required facilities factors, are relied upon to disallow any compelling state interest to overbalance the *Roe* and *Doe* "fundamental right interest" of the woman desiring a sterilization.

Doe v. Rose, 499 F.2d 1112 (C.A. 10th Cir., 1974); *Doe v. Rampton*, 366 F.Supp. 189 (Utah, three-judge Ct., 1973); and *Klein v. Nassau County Medical Center*, 347 F.Supp. 496 (E.D. N.Y., three-judge Ct., 1972), reversed and remanded 412 U.S. 925 (not relitigated), are of a common rationale, placing the substantial grounds for decision upon the assumed invidious discrimination against indigent women electing for abortions by the denial of medical services to them while providing care to mothers bearing their children. Such an extremely broad basis for constitutional resolution, in *extremis*, necessarily disposes the whole of the national power, including the nation's collective resources, at the immediate service of "fundamental rights" as a *constitutional* precept. Constitutional rights become self-enforcing since few, if any, legislative or executive determinations exist which cannot be arguably convicted of being of a "suspect classification" when collaterally or indirectly touching a consistently expanding category of fundamental constitutional rights. (Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Young v. American Mini Theatres, Inc.*, 44 L.W. 4999; and *Dandridge v. Williams*, 397 U.S. 471.)

In *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974),[19] the Court of Appeals reiterates its adopted postulates of *Nyberg* and also directs attention to the indigency consideration, citing *Klein v. Nassau County Medical Center*, supra.

Opposed to this reasoning settled upon by the Court of Appeals, we wish to respectfully suggest a considerable number of matters which would seem to negate the fundamental basis underlying a state's constitutional duty to service women electing to abort their pregnancies for non-therapeutic reasons. Because of the litigational history of this case where the trial court excluded issues and evidence only later raised by the Court of Appeals, supportive matters of record are absent, necessitating reliance upon commonly understood matters or those subject to judicial notice.[20]

This Court in *Roe* and *Doe*, because of the nature of the issues involved, centered its interest and ultimately evolved its judgments upon the constitutional rights of women in the particular area of the abortion situation. But resolution of such issues implicated considerations of legal relationships not strictly confined to the abortion aspect of human generation.[21] As a necessary corollary to fixing the woman's constitutional position regarding abortion, the Court had to accommodate the state's interests in the greater context of childbearing. As a necessary power to realization of the well-being of ordered civil society, the Court recognized a special state interest, of first-order constitutional importance, in the life and health of the mother, embracing the whole of the range of physiological and psychological considerations (410 U.S. 159, 162-163). This interest, except as adjusted to accommodate the woman's reciprocal

[19] Reversed and remanded by Supreme Court July 1, 1976 (44 L.W. 5213).

[20] See infra, Argument II.

[21] Roe v. Wade, 410 U.S. 113, l.c. 177.

prerogative in the special abortion context, was found to be universal and of the most fundamental nature. Even the woman's rights in the abortion realm were declared to be of a limited order reaching only so far as the objective necessities of her well-being might require (410 U.S. 153 and 410 U.S. 189). The conjunctive agent for the actualization of these interests and their accommodation between the woman and the state is the duly licensed physician (410 U.S. 164-165).[22] Further, the Court recognized a state interest in the fetus being borne, in that its maturing existence and proper well-being is likewise a matter of vital concern to the state and within its protection and nurture, conditioned only by the superiorly recognized life and health considerations of the physician for the mother (410 U.S. 163-164).

While this order of constitutional rights, of course, is applicable to and adjusts the abortion situation as conditioned by the privacy interests of a woman, in reason and principle these postulates arise from and have logical relevance to the greater whole of the human phenomenon of childbearing. When the natural course of nature is uninterrupted for maternal life or health considerations, the gestational progression resulting in childbirth is of vital interest to the state. Here its interest in the life and health of the mother and of that of the developing future infant citizen, exists in the widest and most profound sense (410 U.S. 180). As a characteristic of the situation, the most perfect coincidence of interests exists between the mother and the state and, of course, the irresistibly presumed interest of the maturing infant. The harmony of this mutually integrated relationship of interests is concretely realized through prenatal, obstetrical, postpartum, and pediatric care universally contemplated as optimum. The rationally hypothesized interest of the state can be initiated even at a pre-conception state, then to continuously exist throughout the gestational cycle, and thereafter, all referable to the legitimate continuity embracing child-

[22] See: Planned Parenthood of Central Missouri v. Danforth, 44 L.W. 5200, par. "III."

bearing. This is to say, conceptually, childbearing is an independent phenomenon of human existence. It reasonably constitutes a separate, distinct, and exceptionally important aspect of human concern. Obviously, continuation of the Human Race is solely dependent upon it. In this it is apart from all other human functions, and abortion is conceptually foreign to it.

The Court of Appeals' decision in this case would constitutionally justify the imposition of a duty upon the City (as a subordinate organ of the state) to provide abortions to indigent women on a presumed equivalency of the abortion operation with other minor surgical procedures commonly performed in general hospitals. However, such a view, whatever its validity might be in other circumstances, appears to be too restrictive and rationally deficient when applied in the context of the hospital required to furnish *both* the "abortion decision" and if professionally determined to be done, the actual performance of the abortion.

This Court, in its exhaustive examination of the nature of a woman's constitutional privacy rights in the area of abortion (*Roe* and *Doe*), has concluded that a woman does not have an absolute constitutional right to determine for herself whether she will carry a pregnancy to term or terminate it through abortion (410 U.S. 183, 189). The Court has recognized that the matter is infinitely more complex (410 U.S. 177 [18]). The woman and her responsible physician must necessarily confer within a relationship of intimate awareness of the most important considerations involved in the woman's physiological and psychological existence; with the physician possessed of these matters, and giving weight to them as he deems appropriate to the patient's circumstances, he arrives at his thusly informed judgment. This, of course, may be affirmative or negative in relation to abortion. If affirmative and the patient consents, the course thereafter is purely technical in carrying out the surgical operation.

The Court of Appeals' view of the situation gives no consideration to these most important aspects that precede the actual performance of the abortion—if indeed, an abortion is to be performed. The rational reach of the Court of Appeals' limited analysis reduces the matter to a simple "surgical procedure." This does not accord with either the nature of the objective considerations of the situation or the finely thought out applicable pronouncements of this Court.

This abbreviated understanding which the Court of Appeals imposes on the situation is destructive of that proper order of the relationship of the City to its publicly employed, organic hospital staff physicians (and other medical specialties) and the professionally autonomous relationship of these physicians to the patients serviced at the City's hospital. The nature of the matter is not that of simply procuring technically proficient surgeons to comply with women's elections to have abortions.

The declaratory command of the Court of Appeals on the City is gross and unconditional:

> . . . to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. . . .[23]

This essentially requires the City to enlarge its physician, nursing, and laboratory hospital staff so as to accommodate to multiple and disparate personal views of these specialties regarding abortion. An initial major division is required, namely: the addition of ". . . personnel whose personal views on abortions do not prohibit them from providing abortions. . . ." However, within this new division of a two-part parallel medical staff. encounter occurs with gradations and shadings of medical ethics, personal morality, variations of religious beliefs, and other pertinent factors of individual ideology regarding abortion. This

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[23] Petn. for Cert., App. p. A-36.

phenomenon exists because abortion is not simply an "indistinguishable surgical procedure," but as the Supreme Court recognizes, abortion implicates and converges upon the whole range of human considerations.

Direct action by the City in attempting to assemble such a staff immediately involves the City in devising its procurement procedures so as to discriminate regarding such ethical, moral, religious beliefs and ideological persuasions of its prospective employees. Obviously, medical qualification in a technical sense does not satisfy the problem. We have yet to have the guidance of the Supreme Court regarding the general Federal constitutional propriety of such a course (e.g., First Amendment and Fourteenth Amendment, U. S. Constitution) or any specific accommodation to such existing law as Missouri constitutional equivalents, statutory provision Section 197.032, Revised Statutes of Missouri, Laws 1973, and the City's Charter, Article XVIII, Sections 3 (n), 16, and 22[24] as are posed here. But sufficient constitutional legal analogies exist to clearly indicate the gravity of the problem.

Where the City to succeed in accommodating to such staff procurement legal and practical impediments, the same genus of problem would again be experienced in actual practice. Since it must be appreciated that patients of the City's hospitals are not admitted as an adjunct service to a privately practicing physician as in *Nyberg* (having already made the "abortion decision") but through clinical (and emergency) intake arrangements, the same ideological (etc.) considerations come to the fore. Women priorly personally determined upon abortion must be attempted to be accommodated with hospital staff personnel meshing with whatever each individual woman's circumstances might be. To say that the woman's personal health factors re-

[24] Section 197.032, R.S.Mo., L. 1973; and Charter of St. Louis, Art. XVIII, Secs. 3 (n), 16, and 22 are reproduced in Petn. for Cert., pp. 7-9, and Petn. for Cert., App. p. A-65.

garding the medical decision of abortion are objective and apart from her personal conviction of the advisability of abortion does not accord with the reality of the legal range of considerations recognized by *Roe v. Wade* as medically permissible.[25] Because the range of medical warrants for abortion is, for practical purposes, unlimited, the demand of a woman for abortion at the City facility, if not accommodated can only raise the question of the ethical, moral, religious or ideological "insufficiency" of the medical staff such as is presently encountered in this case. This phenomenon operates to confer on women domination over the "abortion decision" contrary to the expression and spirit of the nature of her constitutional rights under *Roe* and *Doe*. Her "wish" or "desire" is transmuted into the medical decision. The conclusion appears inescapable that the rule of the Court of Appeals generates deep impermissible entanglement of the City with the abortion decision where the state is constitutionally prohibited, yet the while doing violence to fundamental rights of physicians (etc.), but unfortunately resulting in "abortion on demand" contrary to *Roe v. Wade*.

The largely assumed factual premises of the Court of Appeals for its concluded presumption of City interference in the respondent's abortion rights, themselves merit careful inspection. Repeating, these assumptions are: abortion is a medically indistinguishable surgical procedure from most other routine operations of general hospitals; the risk of abortion is no greater than other comparable surgical procedures; and performance of abortions does not interfere with normal hospital routine or require further staff facilities. The etiology of these assumptions can at least be partially explained by the fact that the Court interjected physician into the case for the first time on appeal and therefore no development of these decisional matters occurred below. Again, as beforesaid, the paucity of the record mandates that these considerations be discussed in general terms.

[25] Op. cit., *Roe v. Wade*, at 410 U.S. 177 [18].

As a point of initiation, as before said, the assumption that abortion is a "medically indistinguishable surgical procedure" etc. appears flatly in contradiction to the express views of the Supreme Court in *Roe* and *Doe*. There the Supreme Court alluded to the comprehensive range of medical considerations bearing on the abortion decision (e.g., 410 U.S. 177). Particularly, the nature of elective abortion as it relates to physical and psychological well-being is unique. No other medical decision approaches its profound status. Moral, ethical, and religious factors are negatively or affirmatively present for each person involved, including not only the patient but the physicians, nurses, associated technicians, social workers, etc.[26] Considering the Court of Appeals equation of abortion with surgical procedures, for rational insight, one is reminded of the oft quoted remark of Thomas Szasz that the abortion operation bears about as much relation to medical judgment as capital punishment does to electrical engineering. One is hard pressed to recall any other surgical procedure where medical exploratory operations are first performed to establish existential facts such as sex of the fetus, the ectopic nature of the pregnancy, the deformed or diseased condition of the embryo such as Down's syndrome or Tay-Sachs disease, upon which the basis for the mother's reasons are thereafter *formed*, and then medically evaluated in the *after-occurring* "abortion decision."

The Court of Appeals reliance upon its assumption that the hospital routine is not interfered with by the performance of abortions, seems also to be the product of a deficient record and foreshortened analysis of the necessities inherent in the situation. Much has been said foregoing to demonstrate the unique and grave problems of staffing and the peculiarities of operations. Appurtenant to these considerable problems, in order to fairly

[26] Kibel, H.D.: Staff Reactions to Abortion: A6 Psychiatrist's View. Obstet. Gynec. 39:128-33, Jan. 1972.

Connor, E.J.: Therapeutic Abortion. Audio-Digest Ob. Gyn. Vol. 17, No. 16, Aug. 18, 1970.

understand the hospital situation, it must be remembered that the City hospital cannot approach the service of abortion as a private institution might. Regard for the patient prohibits the production-line phenomenon of the abortion clinic such as elucidated in the fatcs of this controversy[27] and recognized in *Planned Parenthood of Central Missouri v. Danforth* (supra, 44 L.W. 5209, Mr. Justice Stewart's concurring opinion, n. 2). Abortion service of the City cannot be limited to any stage or duration of pregnancy; nor can other disease, illness (physical or psychological) or socially debilitating factors of the patient be ignored in haste to simply "terminate the pregnancy." Each of these matters can and do make distinctive demands upon the administration, medical staff, and facilities of the hospital. Unsuspected phenomena are endemic to abortion. For the psychological well-being of both, expectant mothers and women scheduled for or recuperating from abortions, ideally should be isolated from one another.[28] Laboratory technicians as a class exhibit the same strongly held disparity of views as others. Nurses (as the physicians) in significant numbers also divide requiring separate administrative treatment and additional numbers to accommodate abortions. Even custodial workers who are charged with associated duties as disposal of fetal corpses have the recognized right to legally separate themselves from the abortion situation. Serious problems of staff association and otherwise presumed routine cooperation arise over disparate ethical attitudes and deep emotional feelings, actually resulting in interstaff hostility.[29] The added fact (acutely ap-

[27] See Record; deposition of Jane Doe, Aug. 28, 1974, plaintiff, pp. 29-34, and 47-54.

[28] McDermott, J.F. and Char, W.F.: Abortions Repeal in Hawaii: An Unexpected Crisis in Patient Care. Amer. J. Orthopsychiat. 41: 620-26, July, 1971.

[29] Heller, A., Whittington, H.G.: The Colorado Story: Denver General Hospital Experiences with the Change in the Law on Therapectic Abortion. Americ. J. Psychiat. 125: 809-816, 1968.

preciated by medical personnel that abortion practice is a new specialty beyond the experience of most physicians, and is probably the most highly lucrative medical field,[30] compounds the hospital problems of adequate staffing and morale. Medical school affiliation with the City hospital necessary for proper accreditation, is vitally affected over abortion considerations; this is

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Thompson, H., Cower, D.L., Berris, B.: Therapeutic Abortion: A Two Year Experience in One Hospital. J.A.M.A., 213: 991-995, 1970.

"Second Thoughts on Abortion from the Doctor Who Led the Crusade for It." Good Housekeeping, March, 1976, p. 69. This article recounts Dr. Bernard Nathanson's directorship of the largest abortion clinic in the Western hemisphere and his subsequent departure from that work because, "I became convinced that as director of the clinic I had in fact presided over 60,000 deaths." The article discusses staff problems in this way:

> As administrator, Nathanson never saw these women. What he did see was the gradual psychological disintegration of much of his staff.
>
> "The pressures, external as well as internal, on everyone were just enormous," he recalls. Doctors regularly worked 12-hour shifts. One commuted weekly from Kentucky, flying up for a long weekend during which he manned the vacuum aspirator almost around-the-clock, and returning Monday morning to his regular practice.
>
> But it wasn't just a matter of overwork. Psychological factors, stemming perhaps from subconsciouos guilt and inner misgivings, must also have been playing a part. Doctors began "losing their nerve in the operating room," Nathanson says. "I remember one sweating profusely, shaking badly, nipping drinks between procedures." Heavy drinking became a problem with several. Some doctors and nurses complained of deep depression, and some were plagued by terrifying recurring nightmares. One doctor's worried wife cornered Nathanson at a party and anxiously reported that her husband was dreaming continually of blood.
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> "I was seeing personality structures dissolve in front of me on a scale I had never seen before in a medical situation," he recalls. "Very few members of the staff seemed to remain fully intact through their experiences."

[30] Connor, M.J.: Abortions on Demand. A Boon to Moonlighting Doctors. Medical Times. 99: 155, 1971.

evident in the facts of this case involving a religiously affiliated medical school, but this same reluctance to be publicly identified with providing or cooperation in abortion service is experienced with the non-denominational medical school. The equivalency of risk of abortion with other "minor" surgical procedures is patently false.[31] Perhaps the Court lapsed into the error of equating "childbirth" with *first trimester abortion* as a basis for its conclusion. However, if the whole range of abortion service with its attendant complications is considered, the invalidity of the Court's assumption is manifest.

From these essential considerations recalled foregoing, petitioners respectfully suggest that abortion in public hospitals with organic staffs, does not present a simple question capable of easy solution by reversion to prior constitutional precepts of Equal Protection enunciated by this Court. This is to say, the question cannot be safely decided by indiscriminate adoption of either the *Shapiro v. Thompson*, supra, or *Dandridge v. Williams*, supra, rationales. Here a totally new fundamental right—abortion—exercised in a novel and most grave environment is involved. Treatment of the situation through talismanic tests of "fundamental right" and "compelling state interest" approaches, or by an adopted characterization as "social or economic field" matter does not appear to fairly do justice to the realities of the legal-factual circumstances.

As essentially explicated by *Roe* and *Doe*, women's abortion rights are exercisable in a frame of reference of a woman's life or health and only as determined by a physician. This infused independent, physician judgmental, constitutional aspect cannot

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[31] Wynn, M. and Wynn, A.: Some Consequences of Induced Abortion to Children Born Subsequently. The Foundation for Education and Research in Child Bearing. Marriage and Family Newsletter, February, March, April, 1973.

Hilgers, Thomas W.: The Medical Hazards of Legally Induced Abortion. In: Hilgers, T. W. and Horan D.J. Eds. *Abortion and Social Justice*. Sheed and Ward, 1972, pp. 57-85.

be conditioned or "interfered" with by the state or by third persons (*Planned Parenthood of Central Missouri v. Danforth*, supra, and *Bellotti v. Baird*, supra), nor properly dictated even by the woman herself. From the nature of the abortion phenomenon and this constitutional matrix in which it must be considered in particular relation to public hospitals furnishing physicians (etc.) for the "abortion decision," a necessary incompatibility arises. Negation of the fundamental constitutional prohibition, protecting against degradation or obliteration of the physician judgmental function, occurs and cannot realistically be avoided when the state is constitutionally obligated to provide a physician staff, which in the totality of its composition is coextensive with the abortion dispositions of all women it is coerced to service. Such arrangement is self-defeating in that it destroys that essential ingredient of constitutional regard and care for women. The end result is to invest women, not with their constitutional due, but to deprive them of the very vitals that the Supreme Court has justified abortion upon in the first place.

The decisional concept of *indigency*, which the Court of Appeals applies as a constitutionally crucial factor, appears in principle and reason unrelated to the nature of the context of its constitutional Equal Protection investigation. Such a consideration would appear to be more apt if the inquiry were directed toward a setting created by a Due Process claim of impermissible classification rather than arising negatively as here (*Dandridge v. Williams*, 397 U.S. at 485-486). When it is remembered that abortion was almost universally, nationally prohibited with a consequential absence of its existence as a lawful medical service provided either privately or publicly, a necessary postulate of legislative election to enlarge state provided social welfare would appear to be a minimum prerequisite to a claim of class discrimination. Especially so here, where the "class" and the assumed "interference" are the products of a judicially arrived at constructive establishment. We suggest that

there is no compelling principle requiring the State to provide a certain category of medical service simply because a citizen has an abstract right to make its election (albeit under limiting conditions), apart from its realization simply because of indigency. How, it might be asked, does the elipsis excluding such a hypothetical *constitutional right to abortion performance* for persons who are *not* indigent, arise to a compelling constitutional status in the case of an indigent? We respectfully urge that economic distinctions between citizens in this context are not appealing bases for fundamental, *constitutionally* differing attributions of rights. The City has not conditioned enjoyment of the constitutional right to abortion operations upon paying a fee so as to deny a fundamental right to those without the capacity to pay (*Harper v. Virginia State Board of Elections*, 383 U.S. 663).

There are also compelling reasons for not constitutionally equating abortion with childbearing medical services. As discussed foregoing, we urged that the State has a vital, recognized constitutional interest in childbearing. The State's promotion of this interest is time-honored and of unanimous acceptance. Not only is there a long history of positive law enactment to protect and aid mothers and their future offspring (e.g., the Social Security Act, labor laws, etc.) but affirmative provision of a wide range of medical service for childbirth and pediatric care are so much a part of our social fabric as to be obvious. This situation, of course, does not obtain for abortion. To take such an historical recognition and societal provisions for childbirth and to contrast such phenomenon with the very recent legalized abortion milieu as a reasoning process to conclude that such difference is an unconstitutional impairment, appears logically unacceptable. As before urged, childbirth and abortion are of a different order of human concern and experience. Not only are they absolutely, mutually exclusive in nature, but the common fact that both are involved within the context of human generation offers no appealing reason for introducing abortion as a part of the continuity of childbearing so as to postulate a require-

ment of equivalence in treatment. This is to say, because the State has a long history of service to childbirth, such fact, now that legalized abortion exists, is no rational basis for support of the conclusion that an unconstitutional discrimination now passively occurs if abortion service is not now affirmatively provided (*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61).

Finally, the Court is asked to note that the Court of Appeals declared that the respondent's constitutional rights regarding abortion were violated by a *combination* of the Mayor's policy against non-therapeutic abortion *and* the staffing of the hospital with physicians who would not perform abortions without what they considered to be sound medical indications.[32] These physicians did not embrace the psychological factors that may be taken into account in the medical decision relating to pregnant women's health, as being professionally ethical, or morally admissible indications for abortion because of their own private or individual persuasions.[33]

As is plainly evident in the facts of this case and so found by the District Court, the so-called Mayor's policy was *totally unknown* to any of the physicians who came into contact with or treated the respondent.[34] As a logical or factual possibility, such policy could not have affected these physicians' medical judgments regarding respondent. The true bases for the medical judgments were the private ethical persuasions of the doctors as to how they will practice medicine and conduct their personal lives.[35] There was nothing illegal or morally reprehen-

[32] Petn. for Cert., App. p. A-31.

[33] See trial transcript of physicians' testimony at T. 85, 91, 94-95, 102 and 104, 113, 118-119; also *Plaintiff's Exhibit No. 2*, p. 7; also see physicians' affidavits in support of [Petitioners'] Motion for Summary Judgment (D.C. doc. ent. Nov. 1, 1974).

[34] Ibid., T. 97, 107-108, 118-119, 123.

[35] Petn. for Cert., App. p. A-21.

sible about this; and the City, if it was so inclined, would have been powerless to interfere. They ultimately came into conflict with respondent because of their disagreement with her insistence upon economic factors as indicative of abortion.

So it is also with the "staffing" premise of the Court of Appeals. The staffing situation which the lower court refers to, admittedly is an historical accident,[36] which if such question had been material and litigated in the trial would have appeared to be of an entirely different known character than as the Court of Appeals charges as intentional or wickedly accomplished[37] without any justification whatever, and without there having been any opportunity to refute.[38]

We respectfully urge that the factors isolated by the Court of Appeals is violative of respondent's rights to privacy under the Equal Protection Clause are insufficient to sustain such a result. The lower court's reasoning is in conflict with *Roe* and *Doe* in that it commands the institution by the City of an abortion service constitutionally incompatible with an independent medical decision regarding abortion, while objectively investing a woman with the right to an abortion for any reason she asserts. The factual bases underlying the Court of Appeals' reasoning are objectively in error and contrary to matters recognized as otherwise by *Roe* and *Doe*. Further, the Court of Appeals fails to apprehend and condition respondent's rights by those of the City as a dependent part of the State; and erroneously requires the City to establish a policy of favoritism toward abortion without permitting the City to balance and elect between its perception of public welfare, as far as medical services are concerned.

[36] See, e.g., Record, *Appellants' Brief Statement and Argument*, p. 18; C.A. 8th Cir., Case No. 75-1069.

[37] Petn. for Cert., App. p. A-30 (3rd par.).

[38] See Argument following; II Appellate Abuse of Discretion.

II. Appellate Abuse of Discretion

1. Overturning District Court's findings.

It is with great reluctance and genuine regret that petitioners level any complaint regarding the conduct of a United States appellate court. Fair and reflective litigants and their counsel appreciate that the courts universally attempt to do what is right and just within the law, and because the court adjudges matters adverse to one's views and interests is of no weight whatever in evaluating the court's rectitude as an institution for the administration of justice. But as valid and objective as these considerations are in all cases, there are highly infrequent instances where the court may depart from its proper role and thereby gravely affect, not merely the rights of parties, but more importantly in the overview, the administration of justice. On such rare occasions, fidelity to the courts themselves and to the process places a duty upon all concerned to bring such matters to the attention of higher authority. We say, unfortunately this is the present case.

Abortion is a matter that evokes substantial emotional and moral response and this case highlights such phenomenon. Concomitant with this factor, the Court of Appeals in attempting to do its duty as the tribunal of justice between the dedicated litigating parties and the just as partisan public bystanding interests, was required to operate in such environment. The Court composed of equally dedicated human jurists of high convictions could hardly be totally unaffected. We believe it was affected to such an extent as to vitiate the result of its whole proceedings. In saying this, we most quickly also positively and confidently assert that such effect was accidental, unintentional and wholly responsive to the majority members' conception of their duty. All said following is urged within this context.

The Supreme Court has the power under Article III of the Constitution and its Rule 19(b) to review the judicial procedures and conduct of the Court of Appeals in this case so as to determine whether that court, in the exercise of its adjudicatory powers, departed so far from common standards of fairness and impartiality of judicial practice and the positive postulates of the provisions of the Fifth Amendment and Fourteenth Amendment of the Constitution, and the requirements of Rule 52(a) of the Federal Rules of Civil Procedure, that judicial regularity was substantially and adversely offended, and the administration of justice vitiated in a grave matter vitally affected with the National interest.

We believe this Supreme Court's examination of the record of the whole of the proceedings in this case will result in its reversal of the decisions of the Court of Appeals because of such material departure from acceptable standards.

A common attribute of practically every stage of this case, that illuminates the great unfair damage done to petitioners by the Court of Appeals' treatment, is the unusual phenomenon that, from inception of the case almost to the day of trial before the District Court (e.g., Aug. 28, 1974) and after an intervening full-blown appeal before the Court of Appeals, the petitioners were attempting to find out or discover just what this case was about (D.C. doc. ent. 9-21-73). In the factual incidents recounted (with unquestionable documentation) it is seen that the identity of the respondent as well as all means of learning any specific factual matter were intentionally withheld from the petitioners by the respondent.[39] Coupled with this stratagem the petitioners were themselves pressed by their adversary to make admissions through answering interrogatories at a time when they knew virtually nothing about the case (D.C. doc.

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[39] This may have been an elective strategy of the respondent, but it none-the-less denied all access of discovery and meaningful defense.

ents. 9-12-73). Adding to this the respondent mightily pressed her unfair advantage by seizing the opportunity to press for very early summary judgment (D.C. doc. ent. 10-5-73), and in so doing, employed the deceptive tactic of utilizing an affidavit false in itself (and known to be false by respondent and her counsel) and highly deceptive as used in association with the adopted allegations of the Complaint (App. p. 37). The gravamen of the respondent's claim for right to summary judgment relied upon petitioners' answers to propounded interrogatories extensively dealing with the "Mayor's Policy" against elective abortions (App. p. 23). No question was propounded about or interest intimated by the respondent regarding "staffing procedures" or physicion procurement (D.C. doc. ent. 8-17-73). Throughout all stages of the litigation before respondent achieved appellate judgment on the *second* appeal, her tactic was to represent by express address to both the District Court and the Court of Appeals that a situation of great urgency existed for the respondent (D.C. doc. ents. 9-12-73; 9-19-73 and 10-2-73). The aforesaid false and deceptive proof she offered and her whole tactical approach clearly conveyed the impression that the respondent was in a maturing pregnancy condition and required judicial relief for expeditious abortion. However, at least very puzzling to petitioners (and we presume the courts) at the time, she never took those minimal and efficacious steps to alleviate such a represented situation through movement for relieving *pendente lite* orders of the court.[40] Much later we and the Court learned the reason—she had been aborted August 22, 1973.

With this situation pervading the case to just prior to trial on November 25, 1974, or precisely to August 28, 1974,[41] the

[40] Until October 11, 1974, the Complaint prayed for an injunction (D.C. doc. ent. 10-11-74).

[41] D.C. doc. ent. 11-25-74. Deposition of respondent accomplished on 8-28-74.

respondent only thereafter then exhibited an interest in the matter of the City's physician procurement for its hospitals. It is an irresistible conclusion that this interest resulted from the knowledge first gained by respondent from Petitioners' Motion for Summary Judgment served and filed November 1, 1974, with supporting affidavits of each of the physicians having anything to do with respondent that they neither knew of or in any way were influenced by the "Mayor's Policy." Naturally, such affidavit evidence utterly refuted the claim made up to such time that the City hospital staff physicians were interfered with or unconstitutionally controlled in their medical abortion decisions by the said policy; a strategic adjustment had become necessary. Such adjustment was attempted through the tactic of attempting to secure from the trial judge a pre-trial conference ruling that physician procurement was within the notice of the Complaint or the scope of the pleadings. This failed; but judge gave ample opportunity to respondent to bring such matter into the case through amended pleadings which she did not do. Rather, at the trial the respondent made several attempts to offer evidence she deemd appropriate to such issue and when repeatedly thwarted by the trial court, engaged in unavailing argument over the matter. The District Court after forcibly making its position clear to all parties, admitted some of such evidence for an altogether purpose (T. 57-58).

It is against this backdrop that the Court of Appeals' treatment of the case ought to be considered. Moreover, it could hardly be unknown, or as having failed to have been impressed upon that Court, since each incident was a matter of plain record, and the petitioners had expressly brought the matter to the attention of the Court of Appeals by a *highly unusual motion* bringing the conduct till such time before the Court and asking for protection against inadvertent decisional unfairness.[42] Additionally, in the first appeal[43] (spanning March

[42] See: App. p. 54; C.A. doc. ent. No. 7, 4-8-74.

[43] C.A. 8th Cir., Case No. 74-1232.

29, 1974, to June 4, 1974) the Court at such time inferentially construed the Complaint to relate only to the Mayor's Policy and gave no intimation of its much later post-trial construction of the phrase "procedure and practice" as including a claim directed at ideological physician procurement infirmities.[44]

Examination of the Court of Appeals' opinion of April 14, 1975,[45] gives a clear exposition of the way the reasoning of the Court of Appeals ignored this important history of the case, and which in legal effect, totally vitiated an extremely hard fought adversary trial and the District Court's decisional pronouncements upon the issues and proof actually before it.

Initially, the District Court, with unquestionable jurisdiction, exercised its discretion upon the facts before it including *all* the pleadings, remarks of counsel, and interpretation of all the then accrued history of the case (including the Court of Appeals' opinion on remand in Case No. 741,232), ruling that the City's hospital staff physician procurement history was not within the issues framed by the Complaint (T. 57-58; and 60-61). Acting upon such pre-trial determination the Court excluded such issue at trial; and what evidence putatively relating to such matters respondent offered, was only admitted for a totally foreign purpose, namely: whether the City's policy affected the physicians' decisions (*Ibid.*, T. 57-58; and 60-61). The transcript of the trial irrefutably demonstrates that the petitioners adapted themselves to this construction of the trial of issues and were not prepared or required to offer counter-evidence upon any other speculative, evidentiary implications that had been outlawed. In its *Memorandum and Order*[46] the

[44] Petn. for Cert., App. p. A-11, l.c. A-12, n. 1, A-14.

[45] Ibid., App. p. A-27.

[46] Ibid., App. p. A-19.

District Court decided the case in conformity to its pre-trial and trial rulings. Under the evidence the District Court decided that the respondent was demanding to be aborted by physicians who had determined that there were no indicating medical conditions; and on the issues found for the petitioners.[47]

The Court of Appeals first accurately construed the District Court's judgment saying:

> . . . The trial judge appears to have agreed with Doe [respondent] that there is a city policy prohibiting abortions, but he never considered the constitutionality of such policy because he felt that Doe had failed to establish that the policy had been applied to her. Instead, it was his opinion that Doe had merely been refused an abortion by certain physicians at the city hospitals obstetrics-gynecology clinic because of their own personal moral and ethical beliefs on that subject. We reverse.[48]

Thereafter *the appellate court found* a ". . . 'procedure and practice' which operates to bar the performance of abortions at the city's hospitals—the method of staffing the obstetrics-gynecology clinic." The Court explains this *finding* in a footnote No. 3.[49] The Court of Appeals gives no consideration whatever to the fact that the District Court had ruled that the case did not raise the issue of the City's staffing, or the resultant effect such a post-trial, very substantial alteration of the issues worked upon the petitioners. To accomplish this most unfair and damaging result the court (again from footnote No. 3) seized upon the two words "procedures and practices" apparently from paragraph "3" of the Complaint, and asserts:

[47] Ibid., p. A-25.

[48] Ibid., App. p. A-28.

[49] Ibid., App. p. A-30.

> . . . The complaint specifically mentions "procedures and practices" which thwart the performances of abortions as being under attack. . . .[50]

However, when the fair context of the paragraph of the Complaint from where the appellate court extracts these words is inspected, it is found that they plainly refer to something more substantial than an admittedly accidental, historical phenomenon which came into existence through a process of attrition over a period of years long before abortion became a constitutional right. If language has any approximate meaning these two words in context cannot be attenuated so far. Certainly the respondent could not have intended such a meaning since she included within the ambit of the paragraph "Homer G. Phillips Hospital" which she knew was not staffed by St. Louis University Medical School and offered to prove as much upon trial.[51] Then too the respondent's interrogatories and their answers exhibit this agreed meaning.

Much more direct and crucial, the District Court before and during the trial ruled the very question differently. If the Court of Appeals is permitted to reframe the issues after the trial and at such material prejudice to one of the litigants, the only and necessary effect will be to utterly destroy the control a trial court has over the conduct of its litigation. What party will accede to a ruling by the trial court if it is known to be meaningless on appeal and highly hazardous to rely upon at trial? Such a course is the very antithesis of judicial orderliness and fairness. In this instance, petitioners' reliance upon the proper office of the trial court and obedience to the court's rulings places them in the position of having a record barren of any refutation of the Court of Appeals' prejudicial conjec-

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[50] Ibid., App. p. A-30.

[51] T. 60-61; also see C.A. footnote recognizing the *hiatus* of proof: Petn. for Cert., App. p. 31, n. 5.

tures, where otherwise clear, compelling and indisputable refutation could have been produced. In a word, this in effect is "Trial by ambush."

Just as unwarranted is the Court of Appeals "finding" that the "policy" of the city operated (in combination with the staffing from St. Louis University) so as to result in: ". . . indigent pregnant women who desire abortions are unable to find a physician at the city OB-GYN clinic who will perform one . . ." The District Court, well supported by the evidence, found the opposite—that the policy had nothing to do with the respondent being refused an abortion; rather, it was caused by the sole judgment of the physicians who knew nothing about the policy.[52] In this connection it is indicative of the appellate court's use of evidence to note that it relies upon its observation that Doctor Wochner had been given the policy to carry out (Petn. for Cert., App. pp. A. 30 and 32) to support its conclusion that the policy was effective, and yet, the evidence is so clear and compounded that Doctor Wochner did virtually nothing effective to carry out such policy and the staff service physicians knew nothing of it![53]

Further, on appeal the Court awarded very substantial attorney fees to respondent against petitioner Poelker regardless of the fact that the *Complaint did not pray for such relief* and no consideration whatever was given such matter in the District Court. (And District Court awarded petitioners' judgment.) The basis for such award was placed upon the "private attorney general" doctrine. However, when petitioners reminded the Court of the controlling recent ruling of the Supreme Court obviating such awards in the circumstances of this case,[54] the

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[52] See C.A. construction of District Court's findings quoted supra, n. 38.

[53] T. 26-27, 49, 50, 85, 91-95, 101, 104, 108, 113-119.

[54] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 420 (S.Ct. 1975).

awards were then made in like amounts upon a basis of petitioner Poelker's "bad-faith," likewise raised only on appeal by the Court, without any opportunity on the petitioner's part to defend against or refute such serious conviction.[55]

Similarly, even though the respondent had struck her prayer for an injunction before trial and such fact was the subject of particular dialogue in the Court of Appeals' hearing, none-theless the Court awarded an injunction to the respondent; and only withdrew such award after overruling respondent's motions for rehearing and rehearing *en banc* pointing out such fact. and then modifying its opinions.[56]

In engaging in these reformations of the District Court's proceedings which were well grounded in the record, the Court of Appeals gave no regard to rights of the petitioners to due process of law, or to the imperatives commanded by Rule 52(a). These appellate constructions of the pleadings and evidence could hardly be characterized as other than "appellate trial *de novo*." Certainly its conduct vitiated not only the judgment of the District Court, but more irregularly, the whole course of its lawful proceedings. It is patently evident that judgment and punishment was levied upon the petitioners in a proceeding wholly of the appellate court's design and in an unfair *ex parte* manner. The petitioners were not accorded those common postulates of decency surrounding due process of law, notice and opportunity to defend.

Likewise, the Court's disregard of Rule 52(a) is abundantly clear. Crucial findings of the District Court were *not* isolated by the respondent and shown to be "clearly erroneous." The Court of Appeals on its own motion undertook to substitute its "findings" without any deference to the commands of the Rule 52(a).

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[55] Petn. for Cert., App. p. A-44, et seq.

[56] *Ibid.*, App. p. 40, *et seq.*

The Court of Appeals attempts justification for its actions by referring to Rule 8(f), Rules of Civil Procedure, relating to construing pleadings so as to do substantial justice, and by its mystifying assertion that the petitioners could not claim surprise and ". . . did not ask for a continuance or attempt to offer any contrary evidence of [their] own . . ."[57] In view of the extensive circumstances of inequity toward the petitioners, not the least of which is the appellate reconstruction of the issues and trial, the application of such rule against petitioners is most unjust. The assertion imputing fair notice of the staffing issue, and the failure of the petitioners to offer contrary evidence or ask for a continuance is objectively incomprehensible and utterly lacking in rudimentary logic. As before pointed out at length, litigants have a lawful right to rely upon the rulings of the court conducting the trial. To embrace the reasoning of the Court of Appeals these petitioners would have had to set themselves against the lawful authority of the District Court and contemptuously disregard its orders and assaulted its dignity.

Of course, petitioners recognize and fully appreciate the existence of and necessity for an appellate court's broad discretion (co-extensive with that of trial court's), but such discretion is not an unlimited discretion, unfounded in reason or justification; to posit otherwise converts jurisprudence into a lottery. (*Singleton v. Wulff*, — U.S. —, 44 L.W. 5213).

Rule 52(a), Federal Rules of Civil Procedure, set the parameters within which the Court of Appeals should have proceeded. This rule commands that the District Court's findings ought not to have been set aside unless clearly erroneous, and that due regard was to be given to the trial judge's opportunity to judge the credibility of the witnesses. The Court of Appeals had no warrant to try the case *de novo*. *United States v. United States Gypsum Co.*, 333 U.S. 364, l.c. 395. The efficacy of the Dis-

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[57] Ibid., App. pp. A-30 to A-31, n. 4.

trict Court's inferences from undisputed basic facts (e.g., denial of abortion was a matter caused only by the independent judgment of the physicians) was to be respected by the Court of Appeals. There was no evidence of a "combination" with the policy. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, l.c. 291. The Court of Appeals was required to indulge the District Court the presumption that its findings were correct and it was the duty of the respondent to clearly demonstrate error in such findings. This was not done. A reconstruction of the Complaint, after trial, does not satisfy this duty. Possibly no fairer statement of the position of an appellate court on review can be made than that of the Court of Appeals itself in *Pendergrass v. New York Life Insurance Co.*, 181 F.2d 136, l.c. 138 (C.A. 8th, 1950):

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases. * * *

The Court of Appeals has, until late, consistently adhered to its foregoing view of the meaning of the Rule 52(a) and expressly declared that it has no discretion to try a case *de novo; Parke-Davis and Co. v. Stromsodt*, 411 F.2d 1390 (C.A. 8th, 1969); *Birdwell v. Hazelwood School District*, 491 F.2d 490 (C.A. 8th, 1974).

This appellate course completely voided an adversary trial conducted below and put the Court of Appeals in the position of, once having materially changed the issues of a trial completed on another basis, trying the case anew without according petitioners any opportunity to meet such markedly changed situation.

2. Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."

Any question of petitioner Mayor's "bad-faith" and punishment therefor first arose and was decided against petitioner in the Court of Appeals. The issue was never raised in the District Court, no trial of such matters was there had and the District Court awarded judgment for the petitioners, against the respondent with prejudice. The Court of Appeals in its original opinion of April 14, 1975,[58] on respondent's suggestion in her brief, granted an allowance to her against Mayor Poelker of $3,500 for the "appellate portion" of the litigation, and also made an award in her favor against the Mayor for trial attorney fees, in an amount to be determined on remand of the outright reversal of the District Court. The stated basis for these awards was the appellate court's conclusion, that under its "equitable powers" such fees could be awarded because the respondent had acted as a "private attorney general." The Court specifically rejected respondent's suggestion of the alternative ground of bad faith (Ibid., App. A-37, n. 8).

Since there existed no statutory authorization for these Court of Appeals awards, and the matter was one not litigated below, petitioners moved the Court to strike such findings and the awards based on them, suggesting the applicability of the recent case of this Court, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 420 (U.S.S.Ct. 1975), as controlling.[59] The

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[58] Petn. for Cert., App. p. 27.

[59] As above demonstrated, this was the second occasion petitioners were required to move the Court of Appeals to correct erroneous awards against them. Prior, on oral argument (second appeal) before Div. No. 2, upon one of the judges initiation of discussion of the nature of mandatory injunctive relief to be awarded against petitioners, petitioners there pointed to the record showing that the respondent had stricken her prayer for such relief and called

respondent concomitantly moved the Court to deny the motion and sustain the awards on the suggested bases of "willful violation of court orders" and the "bad-faith" of petitioner Mayor Poelker.

In response to petitioners' motion, the Court of Appeals again modified its opinion striking the awards of attorney fees on the basis of private attorney general but adopted the respondent's suggestion to make the same awards on the basis of "bad-faith" (Ibid., App. p. A-44).[60]

We urge that these judicial acts are without authority and constitute a flagrant abuse of discretion.

The stated ground for the conviction of petitioner Poelker of "bad-faith" and making the several awards as punishment, is the Court's supposition that the law was so clear after the United States Supreme Court decided *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, in 1973, and the Court of Appeals had decided *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974) and *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), that any defense against the respondent's claims (as reconstructed by the Court of Appeals) was frivolous and insubstantial, demonstrating:

> . . . a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade*, supra, and *Doe v. Bolton*, supra . . .

upon her attorney to concede the same which he did. None-the-less, in its judgment the Court made such an award of injunctive relief. On petition for rehearing, the Court, *en banc*, on May 7, 1975, modified the divisional opinion so as to eliminate the terms "injunctive relief" at each occurrence and substitute therefor the words "declaratory relief" (Ibid., App. p. A-40).

[60] Presumably because of a total lack of any colorable foundation in the record for conjecturing "willful violation of court orders" (suggested by respondent), the Court makes no mention of such basis.

This is an untenable position. Neither *Roe v. Wade* nor *Doe v. Bolton* decided that municipal hospitals must furnish women "wishing" or "desiring" non-therapeutic abortions with physicians and facilities to carry out their wish. These Supreme Court decisions dealt with the resolution of a woman's personal right as measured against the State's rights under the criminal law. (The correlative rights of physicians were, of course, dealt within the same context.) These *Roe* and *Doe* opinions simply do not address the issue of municipal provision of physicians to perform abortions for either indigent women or women with means.

Further, at the times decisions were made or policies adopted by the petitioner Poelker as Mayor of the City of St. Louis, the whole of the Nation was in a confused and befuddled condition regarding the abortion situation. Beliefs and principles grounded in traditions, fundamental legal precepts, morality, and religious concepts were seen as being dealt devastating blows, not only by the *Roe* and *Doe* decisions, but even prior by the initiation and passage of new regulatory abortion laws such as in New York and Colorado. Litigation was multiplying without definitive decisional clarification in many secondary areas touched by *Roe* and *Doe*. The medical profession too was sharply divided and in a confused state regarding abortion. All of this is not to say that matters are now all resolved and clear, but only to indicate the context of the situation during the times immediaely prior and during the litigation of this suit.

These aforesaid factors are clearly evident in the record of this case. Note the testimonial references of Mayor Poelker and Doctor Wochner to meetings attempting to clarify and resolve the medical and legal problems surrounding the City's concern in the area of abortions (e.g., T-8-9. 21-26). Within this context the Attorney General of Missouri was defending the State's criminal abortion statutes,[61] and the State's legislature was in-

[61] Rodgers v. Danforth, 410 U.S. 949 (1973); and Danforth v. Rodgers, 414 U.S. 1035 (1973).

tensely engaged in legislative proceedings regarding abortion ultimately reaching this Court in *Planned Parenthood of Central Missouri v. Danforth*. The City itself considered and adopted abortion clinic regulatory ordinances; the first of which was litigated in *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974).

It would have been more understandable if the Court of Appeals had reasoned from these cases it cites by analogy to decide this case recognizing that the Supreme Court has not decided the question presented here; however, even such a course could not jurisprudentially excuse the Court of Appeals' abuse because the issue was *not* the meaning of *Roe* and *Doe* but the petitioner's "bad-faith" in not interpreting these cases as the Court of Appeals ultimately did! At the very least it can be said that reasonable men can differ on the application of *Roe v. Wade* and *Doe v. Bolton* to the present case. And if this be so it is manifestly unjust to convict a litigant for seeing the situation differently than the Court of Appeals.

Petitioners suggest that the rationale of the Court of Appeals can be understood and explained by the fact that the Court apparently thought that the issues of this case and those posed in *Nyberg*, supra, were identical. This became apparent at the hearing of the second appeal before that Court,[62] where a member of the Court expressed shock or dismay that its prior decision in the case sustaining the respondent's standing[63] did not cause the termination of the litigation. (The *Nyberg* case and the first appeal of this case were heard at the same sitting in succession.) Attempts by petitioner's counsel to clarify the distinctions between these two cases (and *Wulff v. Singleton*, supra, which a member of the Court stated flatly ruled the case) were

[62] C.A. 8th Cir. Case No. 75-1069.

[63] Ibid., Case No. 74-1232.

unavailing—actually appearing to incur the intense impatience of the Court.[64]

The Court of Appeals cites as additional evidence of petitioner's bad-faith its decision in *Wulff v. Singleton*, supra, as instructive of the law applicable to this situation and to be presumed known to the Mayor. The observation is as follows (Petn. for Cert., App. p. A-34), viz.:

> In the recent decision in Wulff v. Singleton, supra, 508 F.2d at 1215, the state of Missouri had by statute prohibited medicade payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." *There is no practical distinction between that case and this one.* (Emphasis added.)

As can be seen and now is a matter of this Court's own history, the *Wulff v. Singleton* case involved construction of Title XIX of the Social Security Act; that is, Federally provided funds administered by the State. Not the question of *whether* the Federal or State government were constitutionally required to provide such funds for "indigent women." As a consequence, the analogy is rather distant from the case of whether a municipality must recruit complaint physicians for pregnant women "desiring" abortions. Further, the force of the Court of Appeals' reasoning as to clarity of the legal situation is all but destroyed by the express disagreement other United States Courts of Appeals have had with *Wulff v. Singleton*. In *Roe v. Ferguson*, 515 F.2d 279 (C.A. 6th Cir., 1975), the Court of Appeals for the Sixth Circuit, at 515 F.2d 284 of its opinion stated in part:

[64] Record, Transcript of Argument, C.A. 8th Cir., Doe v. Poelker, No. 75- 1069, submitted March 14, 1975.

> . . . We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court. . . .

The Second Circuit has also disagreed with the holding of *Wulff v. Singleton*. In *Roe v. Norton*, 522 F.2d 928, the Court observed that *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, did not deal with the question of a State's right to restrict payments for abortions under social welfare programs such as Medicaid, and "despite lower court decisions holding such restrictions unconstitutional, it cannot be said that this issue has been put to rest by the Supreme Court." (522 F.2d 938). The Court (C.A. 2d Cir.) stated it agreed with the Sixth Circuit and disagreed with the Eighth Circuit on this question (522 F.2d 938, n. 15). Emphasis is added to the lack of "foreseeability" and obscurity of the law applicable to Mayor Poelker, by the Supreme Court's granting *certiorari* in *Wulff v. Singleton*, supra, and reversing and remanding for further hearing on the precise issue thought to so clearly be settled by the Court of Appeals (— U.S. —, 44 L.W. 5213).

Additionally, we urge that, these extremely complicated and subtle legal matters that courts and lawyers have experienced great difficulty with and have arrived at markedly varying views, ought not to be the basis of public castigation and severely punishing a public official not trained in law, but being unable to secure definite medical and legal guidance, relies upon his own conceptions of morality and decency. Even on strictly legal procedural precepts, Senior Judge Van Oosterhout dissented in this case against any award of attorney fees for conviction of "bad-faith."[65]

The reliance of the Court of Appeals on the several cases litigated in Missouri as a demonstration of the Mayor's ad-

[65] Petn. for Cert. App. p. A-51.

judicated "bad-faith" also fails upon objective inspection. *Word v. Poelker*, supra, and this case are cited to sustain such found history of "obstinancy." Of course, the Court's characterization of the Mayor's conduct is the very matter disputed here; but the case of *Word v. Poelker*, supra, merely involved the City's defense of an ordinance regulating (e.g., not prohibiting) abortion clinics. This could not with accuracy, be considered as evidence of a:

> . . . wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court Roe v. Wade, supra, and Doe v. Dalton, supra * * *

as found by the Court (Petn. for Cert., App. p. A-47). After the decision in the *Word* case, the Mayor approved a subsequent ordinance approved by the attorney for the plaintiff in *Word*.

Mr. Chief Justice Burger in *United States v. 12 200-Ft. Reels*, 413 U.S. 123, l.c. 127, gave pointed warning against too easy extension of a rule to new dissimilar situations:

> * * * The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The law declared by the Supreme Court does not seem, in rational application, to warrant the conviction of Mayor Poelker of bad faith and authorize such a severe condemnation and punishment.

It is clear and beyond cavil, that actual "bad-faith" practiced by a litigant in the course of litigation can be, and properly ought to be, punished. (*Aleyska Pipeline Service Co. v. Wilderness Society*, supra; and citations therein.) However, this laudable rule, under the perceived applications authorized by this Court, is not a device permitting arbitrary conviction and punishment without notice or hearing and capricious imposition for having a differing opinion in a new and very passion evoking field, or defending according to well recognized juridical norms.

The Supreme Court gave cogent evidence of the true meaning of the rule in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (S.Ct. 1964). There the Court equated "bad-faith" with contempt. The same gravamen of the offense is illustrated in the earlier case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (S.Ct. 1923). Particularly, in the *Universal Oil Products Co. v. Root Refining Co.* case the Court demonstrates its meticulous insistence that due process of law be accorded a person prospectively considered for punishment for "bad-faith."

Here we respectfully urge there are no facts relating to the conduct of the Mayor which could fairly be assayed as equivalent to a contemptuous disregard of the law; or an ignoring of anyone's rights under "ancient law" such as in *Vaughan v. Atkinson*, 369 U.S. 527 (S.Ct. 1962). Rather, there exists a *good faith* difference of opinion as to the law of this case, and an honest defense to contrary claims so that the matter can be resolved according to due process. In convicting petitioner Mayor Poelker of bad-faith and levying a heavy fine as punishment upon him as "attorney fees" in the course of an appellate proceeding, the Court of Appeals has deprived him of that most fundamental right under the Fifth and Fourteenth Amendments to the United States Constitution—due process of law.

This Court, representing the apotheosis and pride of our juridical system, must certainly recognize the great mischief a rule

such as has been adopted by the Court of Appeals portends. If allowed to stand one necessary effect must be a great deterrence against settlement of civil disputes peaceably in the courts where they belong. Then too officials of government will tend to be "chilled" or neutralized in the performance of their duties, conditioning their official acts upon an understandable overly cautious regard for their personal welfare. And, as is clear here, a justification of severe punishment for reliance upon great and broadly held concepts of morality, in principle, is contrary to and destructive of our Nation's dedication to individual responsibility, as we enforced at Nuremberg.

Finally, this Honorable Court cannot disregard the truth that this bedeviling question of abortion has assaulted our culture and divided our people as no other matter has since the War Between the States. At this juncture our people, political parties, and churches are deeply divided in the matter. It would be strange indeed if petitioner Poelker were not a part of this miliu. To interpret this as "bad-faith" is inaccurate and intemperate.

III. Justiciability, Standing and Mootness

Petitioners respectfully urge that the justiciable case or controversy requirements of Article III, of the United States Constitution, fully sustain the District Court's final determination of mootness under the facts of this case.

The salient facts material to this question are simple and uncontested. The respondent filed her suit on August 17, 1973, against the two petitioners, for a mandatory injunction requiring petitioners as the primary executive officers having control over the City's hospitals, to cause to be simultaneously performed on her an hysterectomy operation and an abortion of her pregnancy, and for a declaration of law of like settlement for all similarly situated members of a class.[66]

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[66] The likelihood of many women existing locally to satisfy such a class appears to be negligible, if not nonexistent.

The respondent, five (5) days after the filing of suit caused herself to be aborted (according to admission of counsel). No disclosure of such fact was made until six (6) months thereafter. The record is silent as to the occurrence of an hysterectomy as claimed to be simultaneously required by the Complaint.

At the time of the abortion of respondent on August 22, 1973, R. Dean Wochner, M.D., the second named petitioner, had not been served with a summons or the Complaint, and, of course, no responsive pleadings were required of either petitioner and no issues were as yet framed for trial.

The physiological fact of the abortion absolutely rendered the Complaint's prayer for respondent's personal abortion injunctive relief nugatory to try, and impossible for the Court to enforce, or the petitioners to obey. The only reason this anomalous status of the case did not timely appear was because of the respondent's imposed secrecy, her refusal to submit to discovery and a deceptive and false motion and affidavit she filed.

Upon challenge, these facts argue irresistibly against the respondent's Federal standing to sue. At the threshold, the words of Mr. Justice Reed, spoken for the United States Supreme Court in *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, are appropriate:

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is true of declaratory judgments as any other field.

And in *United States v. Raines*, 362 U.S. 17, l.c. 21, the reiteration was couched:

> This Court, as in the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it: the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.

Standing to sue is a rational concept grounded in the imperatives of Article III of the Constitution and not a formal rule for administration of the Federal courts. As a substantive matter, going to jurisdiction, it must exist at each stage and throughout litigation of a case, although its aspects may vary or change during the progression of the case. As was said in *Flast v. Cohen*, 392 U.S. 83, l.c. 98, "Standing is an aspect of justiciability . . ." Determinations of Federal standing focus upon the status and character of the litigant and not the claims sought to be adjudicated. Or as put by Mr. Chief Justice Warren for the Court in *Flast v. Cohen* (392 U.S. 99):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 US 186, 204, 7 L Ed 2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether

> the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question. A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," *United Public Workers v. Mitchell*, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of a "hypothetical or abstract character." Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937).

A generalized grievance or hypothetical vindication interest of a party is not enough to raise a constitutional duty for a Federal adjudication.

Further, it is abundantly clear that where the standing aspect of justiciability of a plaintiff ceases, the duty of a Federal court is clear. The case must be dismissed. Such a situation was squarely before the United States Supreme Court in *Golden v. Zwickler*, 394 US 103, where the plaintiff's relation to claims sought to be enforced (even though without any voluntary act of his own—contrary to the case here) changed to destroy standing. There the sequence of events unmistakably demonstrate that standing must exist throughout and not merely at the time of the filing of the Complaint. In the words of the Court (394 U.S. 108):

> The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on the remand. We now undertake that inquiry.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." United Public Workers of America v. Mitchell, 300 US 75, 89, 91 L Ed 754, 766, 67 S Ct 556 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 US 270, 273, 85 L Ed 826, 828, 61 S Ct 510 (1941). (Emphasis added.)

At the conclusion of its opinion the Court again stresses this continuing requirement of standing in stating (394 U.S. 110):

> We conclude that Zwickler did not establish the existence *at the time of the hearing* on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded with direction to enter a new judgment dismissing the complaint. (Emphasis added.)

For the sake of concentration on the precise issue, since the respondent was pregnant at the time of the filing of her Complaint, it would appear that, at least as to this factor, she was

possessed of standing at that time to seek an adjudication of her claims of infringements of personal constitutional rights as a *pregnant* woman seeking certain relief. Her personally sought redress was for a judicially coerced surgical operation upon her body for the removal of claimed diseased organs and destruction of the fetus in her uterus. Declaratory relief was incidental to and dependent upon such injunctive vindication.

However, the respondent caused her own abortion on August 22, 1973, at such early pre-trial time, she thereby completely obviated that "personal stake in the outcome of the controversy" and the quality of "sufficient immediacy and reality" to warrant any justifiable relief from the District Court. Of course, objectively the Court could not enforce her abortion: this she accomplished on her own. No judgment imposing such a duty on the petitioners to cause her abortion could have any real personal meaning for the respondent—her claimed legal relationship toward the petitioners had been irretrievably changed by her own doing. As far as her litigant status was concerned, the legal effect of her act in procuring an abortion was to destroy all possibility of ever establishing on hearing the fact of pregnancy upon which her claims depended. The effect could hardly be different in substance than a failure of proof on trial.

Just as in *Golden v. Zwickler* (394 U.S. 103, l.c. 109), where the Court pointed out that the situation giving rise to the complaint was most unlikely to ever recur (e.g., a judge resigning and again standing for election as a Congressman), here the respondent's pregnancy was past, and according to the recitals of her Complaint (p. 3, par. 11), the concomitant hysterectomy she had determined upon, forever destroyed any future possibility of recurrence.

It will be noted that the Supreme Court in *Roe v. Wade*, supra, cited *Golden v. Zwickler*, 394 U.S. 103, as particular authority in support of its determination that Roe's case was

possessed of the attributes of a Constitutional "case or controversy" and she was possessed of standing as late as May 21 (e.g., the day before trial) (410 U.S. 124). The patent holding in *Golden v. Zwickler* is the necessity of the existence of such a controversy at the time of the *hearing*—not at the time of filing. There can be no question whatever that *Golden* presented a case or controversy at the time of the filing, yet the decision of the Court was premised upon his standing *at the time of the hearing*—not the time of filing. (*Golden v. Zwickler*, supra, 394 U.S. 108 and 394 U.S. 110.) The litigant was held to have lost his admitted filing standing (i.e., "status") at the time of the hearing, and the case, in consequence, having lost its Constitutional case or controversy posture thereby.

It would appear just as compelling that when respondent lost her personal standing the class aspect of the suit was likewise vacated. Initially, respondent was the *sole* representative of a very nebulous class. Her person with its attendant personal characteristics gave justiciability to the suit. Once her status was changed, namely: no longer being pregnant and wanting an abortion and needing a hysterectomy, the case was without that "concrete adverseness" required for adjudicating the claims according to constitutional requirements of justiciability. *Baker v. Carr*, 369 U.S. 186, l.c. 204. As the Court instructed in *Baker v. Carr* (369 U.S. 208) justiciability demands more than "* * * merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law * * *.'" The corollary is, of course, "* * * federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *North Carolina v. Rice*, 404 U.S. 244, 246. Of late the United States Supreme Court has had occasion to point out that the alleged rights of a class cannot survive a circumstance which renders the only part litigant's claim moot. *Indiana Employment Division v. Burney*, 409 U.S. 540. (See also: *Linda R. S. v. Richard D.*, 410 U.S. 614, and *Bailey v. Patterson*, 369 U.S. 31.)

The question of Federal standing has been the subject of United States Supreme Court consideration in the late abortion case of *Roe v. Wade*, 410 U.S. 113. There the Court considered the status of justiciability and standing of each party appellant according to their several, separate situations. Further, it is crucial to note that the Court makes a fundamental legal distinction in its analysis between *trial* standing and *appellate review* standing.

At the Court's division "A" of its opinion (410 U.S. 124) the Court first addressed appellant "Jane Roe's" standing. The Court reviewed the significant sequence of the progress of the litigation with respect to her and concluded as a matter of fact that she was pregnant at the time of the hearing before the trial court. The unquestionable fact of this observation is established by the following quotations of the Court's opinion (410 U.S. 124):

> A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and *as late as May 21 of that year* when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> Viewing Roe's case as of the time of its filing, *and thereafter until as late as May*, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, *she, as a pregnant* single *woman* thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F2d 833, 838-839 (CA6 1971); Poe v. Menghini, 339 F Supp 986, 990-991 (Kan 1972). See Truax v. Raich, 239 US 33, 60 L Ed 131, 36 S Ct 7 (1915). *Indeed, we do not read the appellee's brief as really asserting anything to the contrary*. The "logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 US at 102, 20 L Ed 2d 947, and the necessary degree of contentiousness, Golden v. Zwickler, 394 US 103, 22 L Ed 2d 113, 89 S Ct 956 (1969), are both present. (Emphasis added.)

It can fairly be pointed out that in its canvass of the facts, the Court *found* that on May 21, 1970, which was the day before the trial hearing of May 22, 1970, Roe filed an affidavit of her *pregnancy*. The Court, absent any question about the matter, properly concluded it incredible that she was aborted over night especially where the trial record is silent regarding such a matter and the Court observes "Indeed, we do not read the appellee's brief as really asserting anything to the contrary * * *." (410 U.S. 124.)[67]

After so fixing the factual context of Roe's situation at (and after) the trial hearing, the Court then turned to a consideration of her *appellate* standing. The immediate cause of this inquiry was the appellee's suggestion that (410 U.S. 124) "Roe's case must *now* be moot because she and all other members of her class are no longer subject to any 1970 pregnancy." (The case was argued December 13, 1971, and reargued October 11, 1972.) After pointing out that "[t]he usual rule in federal cases is that an actual controversy must exist at stages of *appellate or certiorari review*, and not simply at the date the action is initiated * * *" (410 U.S. 125, emphasis added), the Court pointed out that pregnancy, because of its relatively limited duration, normally would not exist until the "appellate" process is completed. Because of this inexorable fact of life, the Court observed (410 U.S. 125) that "* * * If that termination makes a case moot, pregnancy litigation seldom will survive *much be-*

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[67] Here the respondent procured her own abortion within five days of filing suit and before one of the two defendants was summoned.

yond the trial stage, and appellate review will be effectively denied * * *." (Emphasis added.) For this reason, coupled with the normal biological phenomenon that the *same woman* repeatedly experiences pregnancy, the Court applied the "Continuing Controversy Doctrine" to demonstrate the existence of standing and "non-mootness" at the *appellate review* stage. The familiar apothegm—"capable of repetition, yet evading review" —is declared for emphasis, and four cases are recited as supportive.

In addition to the fact that the Court is speaking strictly about standing at the *appellate* stage, several other observations are pertinent. It will be noted that the buttressing authorities cited by the Court each concern the question of "mootness" or "standing" only at the *appellate* stage. (410 U.S. 125.) No question of "trial standing" or "trial mootness" was raised by the parties contrary to here. Further, the decisional history of the "continuing controversy" exception relates to the *appellate* stage and not pre-trial situations. This is readily apparent from the long (and numerous) line of decisions dealing with the exception and its logical purpose. And, besides the Court expressly saying that it is dealing with mootness at the appellate stage, as before pointed out, at another part of its opinion when *sua sponte* discussing *trial stage* standing, it first finds the fact to be that Roe *was pregnant at trial* and cites prior decisions each requiring the actual status *at trial* to be as issuably pleaded in the Complaint as a basis for relief.

Here the doctrine of "continuing controversy" has no rational application. The question here is not respondent's *appellate* standing but her *trial* standing. There is no basis for or possibility of, "trial" of her Complaint as a pregnant litigant. This was absolutely foreclosed by her own voluntary act—*before trial*. The support the United States Supreme Court points out for the pregnancy of Roe at trial by her affidavit is, of course, nonexistent here. As a matter of fact the opposite is true for the

respondent's affidavit (in support of her motion for summary judgment) filed here, although at the time (October 5, 1973) apparently neither the District Court or petitioners noticed the absence of any positive recital of pregnancy such as was contained in the Complaint because of its otherwise false and deceptive nature.

Because of their use by the United States Supreme Court in the context of *trial standing*, the decisions cited in ***Roe v. Wade*** (410 U.S. 124) can be profitably referred to.

The first case cited is ***Abele v. Markle***, 452 F.2d 1121, l.c. 1125. This case markedly illustrates that in the context of contesting a claimed right to personal abortion, a woman must at least be pregnant. There the Court of Appeals said:

> Accordingly, we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their child-bearing age.

At the outset the Court framed the issue of standing of the appellant lay women as a capacity to "present" a justiciable case (see: 452 F.2d 1124, para. 1-3). After receiving the controlling principles of "standing" and nothing that none of this class of women were pregnant (according to their Complaint and *affidavits*), the Court ordered that the trial court's dismissal be affirmed with leave to amend the Complaint, only to women who *are pregnant*. In this context it is helpful to be reminded that courts do not adjudicate pleadings but *cases*, and this was the actual effect accomplished.

Citation of this case in ***Roe v. Wade***, in the context of the Supreme Court's finding that "Jane Roe" was pregnant at trial, leaves no room for inference that the Supreme Court con-

sidered pregnancy at filing sufficient basis for standing where an abortion thereafter voluntary occurs before trial.

Crossen v. Breckenridge, 446 F.2d 833, is also consistent with petitioners suggested meaning of standing as explicated in *Roe v. Wade*. There the Court of Appeals of the case was within the frame of a denial of a complaint motion for appointment of a three-judge court by the District Court which determined a lack of standing and dismissed the complaint. As a consequence, the review of the appellate court was directed toward the record as it existed regarding the status of each party plaintiff at the time of the dismissal by the District Court. This status was solely and only discernible through inspection of the complaint since this was the extent of the record at the time bearing on each appellant's "personal stake and interest." (*Barlow v. Collins*, 397 U.S. 159.) The Court found that a pregnant woman (Pat Croddock) had standing, and a non-pregnant woman (Fran Pozzuto) lacked standing saying (446 F.2d 839):

> * * * It does not appear that this appellant presented more than hypothetical case to the district court. Her only connection with the asserted right of marital privacy is that she may become pregnant in the future. This is not a sufficient nexus to distinguish her from any other woman capable of bearing children. No injury is alleged, actual or threatened, other than the hypothetical possibility that she may be denied an abortion should she become pregnant. Accordingly we hold that appellant Pozzuto does not have standing to challenge the Kentucky abortion statute under the federal Constitution. * * *

The same rule was applied to a women's rights organization. Parenthetically it can be noted that the "class status" of the dismissed out appellants did not lend justiciability or standing.

The third case cited in *Roe v. Wade* is *Poe v. Menghini*, 339 F.Supp. 986. This case contains the flat statement that the

only two women involved as plaintiffs, Jane and Sally Poe, are "* * * at the time this action was commenced, were in need of abortions * * *" but unable to obtain them (339 F.Supp. 989). The trial court (three-judge Dist. Ct.) fully heard the case and its recital of the facts gives every indication of the pregnancy of these women at trial hearing. The relief prayed for included injunctive relief relating to the inability of the women to secure a local legal abortion. While the Court did not mandate any specific relief to insure abortion, its reason was clearly *not because of the absence of pregnancy* of the concerned plaintiffs, but because the Court, in view of its declarations, felt injunctive relief to be unnecessary because of the presumption the defendants would comply with the declaration. Consequently, the case stands for the proposition it was utilized for by the United States Supreme Court, namely: pregnancy at time of trial adjudication is a constitutional requisite for standing and justiciability.

The final case cted on the point by the Supreme Court in *Roe v. Wade* is *Truax v. Raich*, 239 U.S. 33, appears to be collaterally cited for its illustration of the approximity and facility of relief *pendente lite* to ensure the preservation of litigants' claimed constitutional rights until adjudication upon trial. Here, in this case, no temporary relief was prayed—no motion or other address to the trial court was made, because the actions of the respondent had rendered the matter hypothetical.

The pronouncements of the United States Supreme Court in *Roe v. Wade*, regarding the "Does" is contently equivalent to the here respondent's status than that of "Jane Roe." As is observed at "C" of the opinion (410 U.S. 127) "Mrs. Doe" who is not pregnant, and her husband asserted essentially the same claims as Jane Roe, but because of the wife's non-pregnant posture, relied upon present fear of future pregnancy without possibility of legal abortion as their basis for attack on the Texas statutes. The Court determined they lacked standing saying (410 U.S. 128):

> But we are not prepared to say that the *bare allegation* of so indirect an injury is sufficient to present an actual case or controversy. (Emphasis added.)

Respondent, at best, upon trial, could only have proved the future possibility of pregnancy, and, except for the deception practiced by respondent in hiding her non-pregnant status, her allegation of pregnancy in this Complaint could have been stricken on motion had it been known. Moreover, such disparity between proof and pleading, obviates the latter averment as a significant legal declaration thereafter. Permitting proof of a prior condition necessarily results in speculative declarations and advisory opinions.

It would seem to necessarily follow that if the Court of Appeals' concept of standing were rationally applied, any individual woman, who was pregnant at any time (after *Roe v. Wade*) and claimed to have been illegally denied an abortion would be vested with standing regardless of her *non-pregnant* condition at the time of *filing*. Such an individual would have the same claim of "injury" as respondent here and could present at least an equivalent "status" as the respondent under the Court of Appeals' reasoning, and could just as fully benefit by a declaration of her constitutional rights regarding an abortion even though it occurred before filing. Such a result is contrary to the unquestionable holdings in the cases cited by the Supreme Court in *Roe v. Wade*, supra, 410 U.S. 124, as authoritatively propounding the rule of lack of standing for non-pregnant litigants claiming constitutional infringement of rights to abortion, and is hostile to the general requirements propounded requisite to Article III justiciability.

As a consequence of the force of the authorities, it appears that respondent's standing to litigate in the constitutional sense, was terminated when she, within five (5) days after filing suit and before trial, voluntarily caused her pregnancy to be aborted, and the Court of Appeals was without jurisdiction to do other than affirm the District Court. Here standing and mootness are

companions ruled by the same factually destructive incident—self-procured abortion.

CONCLUSION

Petitioners urge that this Honorable Court, according to the requirements of Article III of the Constitution, ought to vacate the judgments of the Court of Appeals and remand with directions to enter an affirmance of the District Court's dismissal of respondent's case because of lack of standing to sue and mootness of the questions attempted to be presented by her.

In denying this, petitioners pray the Court to reverse the judgment, amendments to judgments and orders in Court of Appeals Case No. 75-1069, and Case No. 75-1648 and all subsequent orders thereon taken in effectuation of such judgments, because that Court, contrary to the holdings of *Roe v. Wade* and *Doe v. Bolton*, has adjudged that the petitioners must institute a City hospital service of "abortion on demand;" and reverse such Court of Appeals arbitrary awards of attorney fees as an abuse of discretion.

Respectfully submitted,

JACK L. KOEHR
City Counselor of the City of
St. Louis, State of Missouri

EUGENE P. FREEMAN
Deputy City Counselor of the City of
St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
(314) 453-3366
Attorneys for Petitioners